A

DATO' SERI TIMOR SHAH RAFIQ v. NAUTILUS TUG & TOWAGE SDN BHD & ANOTHER APPEAL

FEDERAL COURT, PUTRAJAYA
TENGKU MAIMUN TUAN MAT CJ
VERNON ONG LAM KIAT FCJ
B HARMINDAR SINGH DHALIWAL FCJ
[CIVIL APPEAL NOS: 02(f)-31-04-2022(W)
& 02(f)-32-04-2022(W)
8 FEBRUARY 2024

C

Abstract – *A shareholder of a company may bring an action on behalf of the company, known as a derivative action, if he believes that there has been a breach of duties by the management, majority shareholders or directors of the company. Leave of court must be obtained from the court before the derivative action can be proceeded on. In its determination to grant leave, the court would consider the pre-requisites set out under s. 348(4) of the Companies Act 2016, ie, whether the applicant is acting in good faith and the application is being made in the best interest of the company. The court would also weigh the factor as to whether the applicant is motivated by collateral purposes in his application. If so, it would amount to an abuse of process and such application is bound to fail.*

D

E

F

COMPANY LAW: *Derivative action – Action on behalf of company – Application for leave by minority director – Company saddled with unverified and unsubstantiated debt – Whether applicant shown honest belief that good cause of action existed – Whether had reasonable prospect of success – Whether leave would be refused if alternative remedy available – Whether alternative remedy carries less force – Whether only considered in relation to 'best interest of company' – Whether company would gain benefit if derivative action successful – Companies Act 2016, ss. 347 & 348*

G

COMPANY LAW: *Derivative action – Action on behalf of company – Application for leave by minority director – Whether wrong committed against company – Whether leave threshold satisfied – Whether application in 'good faith' and 'it appears prima facie to be in best interest of company' – Whether application based on incomplete report – Whether collateral purpose shown – Whether action premature – Companies Act 2016, ss. 347 & 348*

H

COMPANY LAW: *Derivative action – Application for leave – Locus standi – Principles of 'clean hands' or 'proper person' – Whether associated with common law derivative action – Whether replaced with statutory derivative action – Whether common law principles under exceptions to rule in Foss v. Harbottle cease to apply*

I

– Whether Companies Act 2016 adequately provided definition of complainant who may initiate, intervene in or defend proceeding on behalf of company – Whether less appropriate to rely on principles in relation to 'clean hands' – Companies Act 2016, ss. 345, 347 & 348

WORDS & PHRASES: *'good faith' – Meaning of – Application for leave to commence derivative action – Pre-requisites under s. 348(4) of Companies Act 2016 – Whether applicant must not pursue ulterior motive*

The plaintiff was a director of the defendant, a joint venture company set up to build, own and manage tugboats. The defendant was owned by Azimuth Marine Sdn Bhd ('AMSB') holding 80% of the shares and Nautilus Supreme Sdn Bhd ('NSSB') holding 20% of the shares. The defendant also served to provide harbour tug services for a project by Vale Malaysia Minerals Sdn Bhd ('Vale'). Disputes escalated between the majority shareholder, AMSB, and the minority shareholder, NSSB, primarily out of mistrust and perceived lack of transparency. The present appeals, Appeal 31 and Appeal 32, stemmed from two applications for leave to commence derivative actions on behalf of the defendant. In Appeal 31, the facts were that, on 11 April 2013, the defendant entered into an agreement with Vale, the sole customer of the defendant, for the charter of seven harbour tugboats owned by the defendant. The defendant entered into an agreement with Azimuth Ship Management Sdn Bhd ('ASM'), appointing ASM as the designated ship manager to manage and operate the harbour tugs and to provide harbour tug services on behalf of the defendant for 15 years. The principal shareholder of ASM was Dato' Suresh, who was also a nominee of AMSB. Following the sinking of one of the harbour tug boats, NTT Lumut, which was managed by ASM and chartered to Vale, the Board of Directors ('Board') of the defendant was briefed of the incident and it was also reported that Vale, the Marine Department and the insurers had undertaken their respective investigations which indicated that the incident was an 'accident'. The subject matter of the plaintiff's complaint was the refusal by the Board to agree to the plaintiff's initial proposal for an independent investigation into the sinking of NTT Lumut. The plaintiff had engaged one Alan Loynd ('Loynd') of Branscombe Marine Consultant Ltd in Hong Kong, who provided a preliminary report on the incident. However, when the Board eventually agreed to appoint surveyors to conduct an independent investigation, the plaintiff's complaint moved to the refusal of the Board to agree to the plaintiff's new proposal which was to appoint separate independent experts by the majority and minority directors, respectively. Since no legal proceedings were taken by the defendant against ASM, the plaintiff filed the application for leave to initiate proceedings against ASM in the name of the defendant under ss. 347 and 348 of the Companies Act 2016 ('CA'). In opposing the application, the defendant argued that the plaintiff was not acting in good faith and that the legal action against ASM would not be in the best interest of the defendant

upon grounds, *inter alia*, that such legal action would fail as the defendant had successfully claimed under its insurance policies for the loss suffered from the sinking of NTT Lumut. The High Court held that the plaintiff was premature in seeking leave under s. 348 of the CA, as the Board was *prima facie* in the best position to determine what was in the best interest of the defendant. On appeal, the Court of Appeal dismissed the plaintiff's appeal and affirmed the decision of the High Court in refusing to grant leave to initiate derivative action.

In Appeal 32, the defendant entered into a sale and purchase agreement ('SPA') with Shin Yang Shipyard Sdn Bhd ('SYS') on 12 April 2013, where SYS agreed to build, sell and deliver seven tugboats to the defendant as required by Vale for the total amount of USD68.5 million ('total purchase price'). A facility agreement was entered into between the defendant and Export-Import Bank of Malaysia Berhad for the finance of 70% of the total purchase price of the tugboats. The shareholders agreed that the balance of 30% of the total purchase price ('balance purchase price') amounting to USD20,550,000 would be financed by way of shareholders' advance of the defendant ('shareholders' advance') which would be treated as debt due from the defendant to the shareholder, and the defendant would pay interest at the rate of 7% on the shareholders' advance ('shareholders' interest') to be paid to its two shareholders, namely AMSB and NSSB, based upon the amount paid. On 16 December 2012, Dato' Suresh furnished to the plaintiff a breakdown of the shareholders' advance demonstrating that the defendant only required from the shareholders a sum of USD12,370,000 whereby the portion of NSSB was USD1,864,176 to be paid in five instalments and the balance was to be paid by AMSB. However, sometime in early 2015, Dato' Suresh negotiated a reduction in the final amount payable to SYS. As such, NSSB was not required to pay the fifth instalment, and only paid four instalments of RM4,998,882.52. However, the plaintiff was subsequently alerted to some discrepancies with regard to the payment of the balance purchase price to SYS. It was then discovered that a sum of over RM90 million had been captured in the audited accounts of the defendant as shareholders' advance. The minority directors were rebuffed when pressed for an answer from the defendant. The plaintiff thereafter obtained an order that accounting and other records of the defendant be opened for inspection ('inspection order') pursuant to which the auditor, Messrs Crowe Horwath ('Crowe Horwath') carried out the inspection and prepared three reports, the preliminary report, the supplementary report and a follow-up report ('Crowe Horwath reports'). The three reports significantly demonstrated that there was a lack of any independent and credible evidence to substantiate payment of approximately USD19.9 million recorded in the defendant's books as the shareholders' advance by AMSB. Despite the inspection order, the complete accounting records of the defendant were not made available to Crowe Horwath. The plaintiff subsequently, proceeded to apply for leave to initiate

derivative action under s. 348 of the CA on behalf of the defendant to hold the putative defendants jointly and severally liable and accountable for the shareholder interest of RM14,619,166.47 paid out by the defendant to AMSB and NSSB premised upon the shareholders' advance which was not properly substantiated by any documents. The High Court decided that the plaintiff had failed to satisfy the pre-requisites under s. 348 of the CA to obtain leave to commence a derivative action on behalf of the defendant. On appeal, the Court of Appeal, ruled that the plaintiff had satisfied the threshold for good faith and the best interest of the defendant for the granting of leave to commence derivative action.

Held (dismissing both appeals with costs; affirming decisions of Court of Appeal)

Per Harmindar Singh Dhaliwal FCJ delivering the judgment of the court:

(1) The plaintiff could not have an honest belief that a good cause of action existed and had a reasonable prospect of success. The Loynd report, which the plaintiff had placed great reliance on, was incomplete and inconclusive and could not, therefore, provide the basis of such honest belief. Loynd did not have sufficient evidence to fully explain the incident and it was merely his 'feeling' that the incident could have been avoided. (para 88)

(2) An applicant is required to ensure that the application for leave is not brought up for a collateral purpose. There is no good faith if the applicant possesses collateral purpose which amounts to an abuse of process unless the applicant proves that it is sufficiently consistent with the purpose of doing justice to a company. It was reasonable for the plaintiff to seek an independent investigation into the sinking of NTT Lumut and there was nothing sinister that could be attributed to the plaintiff in insisting for an independent investigation as Dato' Suresh, being the owner of ASM, was in a position of conflict. Hence, the argument on collateral purpose failed. However, it was plain that the plaintiff had failed to establish good faith. (paras 88 & 92)

(3) There were genuine commercial considerations for the defendant not to pursue the action. It was significant that Vale, being the sole customer of the defendant, did not wish to be drawn into the dispute, as that may jeopardise the relationship between the defendant and Vale, and it certainly would not be in the best interest of the defendant for leave to be granted. The defendant had also been paid a sum of USD153,002.18 and approximately USD5.2 million, respectively, under the insurance policies. Further, the Board had unanimously resolved to enter into a supplementary agreement with Vale to cancel the charter of NTT Lumut for a sum of USD3.5 million to be paid by Vale to the defendant. The report by Messrs Parker Randall also concluded that the net income from the insurance proceeds and compensation from Vale was higher

A than if compared to the vessel's continuing operations. Thus, even if legal action was successful, it may turn out to be a Pyrrhic victory for the defendant. The plaintiff, therefore, could not be said to be acting in good faith and it did not appear *prima facie* to be in the best interest of the defendant that leave be granted. (paras 97, 98 & 100)

B **(4)** In regard to the Appeal 32, there were no documents to prove the amount which AMSB was alleged to have paid as shareholders' advance. There were no documents to prove that the defendant had agreed to allow AMSB to make direct payments to SYS on its behalf. The preliminary report issued by Crowe Horwath pointed to the C unavailability of records and documents in relation to the shareholders' advance. The supplementary report reaffirmed that findings and stated that 'unavailability or non-keeping of the above-mentioned records and documents raises grave concern over the manner in which the management maintain their accounting records'. The follow-up report D concluded that 'the veracity of the financial statements is called into question' since the amount of USD19.9 million as the shareholders' advance from AMSB was totally unsubstantiated by proper payment documentation. Also, the letters from SYS acknowledging the receipt of payments did not provide the identity or even a single detail of the payer E of the purported amount referred to in each of the letters, particularly whether the payer was the defendant, AMSB or other third party. Therefore, it was plain that the plaintiff had satisfied the element of 'good faith' in respect of the subjective component of the honest belief that a good cause of action existed and had a reasonable prospect of success, as well as the objective component of honest belief that a F reasonable person in the circumstances could hold that belief. (paras 131-133)

(5) The actions of the plaintiff could not, by any stretch, be that of vengeful retribution but were in the end reasoned and reasonable. It can hardly be said that the plaintiff had distorted the dispute and that his motivation G was designed to distract and destroy the defendant. The plaintiff was perfectly entitled to seek answers as to how the payments to SYS were made. When all he got in response was that SYS had confirmed receiving full payment without providing any documents as to how SYS was paid, anyone in the plaintiff's shoes would have insisted on answers. H Hence, the element of 'good faith' was made out after establishing the subjective and objective components of honest belief coupled with the absence of any collateral purpose. (paras 137 & 139)

(6) The defendant was saddled with a wholly unverified and unsubstantiated debt in excess of RM90 million with the result that millions of ringgits I in shareholders' interest was continuing to be paid out by the defendant. The defendant would therefore gain substantially in money terms of

being relieved of the debt through the proposed derivative action in the event that such derivative action was successful. If the action was successful, the defendant would also stand to recover the shareholders' interest already paid by the defendant to NSSB and AMSB. It was unlikely that the proposed derivative action would distract the defendant from its focus on the lucrative business with Vale as the parties were fully aware of the facts of the case. (paras 140 &141)

(7) It is not necessarily the case that leave would be refused if an alternative remedy is available to redress the disputes. The availability of alternative remedies merely serves as a factor which the court may consider in relation to the element of 'best interest of the company'. However, the argument of an alternative remedy carried less force in the present case as the inspection order obtained by the plaintiff failed to yield concrete results. (paras 143 & 144)

(8) The principles in relation to 'clean hands' or 'proper person' or whether one should have control over the derivative proceedings is more associated with the common law derivative action with regard to the issue of *locus standi* to bring a derivative action. The common law derivative action has been replaced with the statutory derivative action under ss. 347 and 348 of the CA, in that, the principles under common law, namely, the well-entrenched exceptions to the rule in *Foss v. Harbottle* cease to apply for leave applications under s. 348 of the CA. In the same context, since s. 345 of the CA has adequately provided the definition of complainant who may, with the leave of the court, initiate, intervene in or defend a proceeding on behalf of the company, it may be less appropriate to rely on the principles in relation to 'clean hands' to determine whether an applicant is a proper plaintiff as the said principle is more consonant with the common law derivative action. (paras 150 & 151)

(9) An applicant will not be disqualified from commencing a derivative action for the benefit of the company if he will derive any other benefit from the claim. What is more important is that the applicant must not be pursuing an ulterior purpose unrelated to the subject matter of the claim and that, but for his ulterior purpose, he would not have commenced proceedings at all. The High Court was wrong in holding that the plaintiff was a direct and knowing participant of the alleged wrong as he had sanctioned the payment of the shareholders' interest. This was against the irrefutable evidence that the plaintiff and Dato' Mohamed Yaacob, the minority directors, stopped approving, after July 2017, the payment of shareholders' interest on the advances. On becoming aware of the discrepancies and probably dubious shareholders' advance, unsupported by relevant documents, they had

A deferred and refused to approve the further repayment out of the shareholders' interest until the issues were resolved. Therefore, the elements of 'good faith' and 'best interest of the company' as required under s. 348(4) of the CA were satisfied and accordingly, the appeal could not succeed. (paras 153, 156 & 158)

B ***Bahasa Melayu*** *Headnotes*

Plaintif adalah pengarah defendan, sebuah syarikat usahasama yang dibentuk untuk membina, memiliki dan menguruskan kapal tunda. Defendan dimiliki oleh Azimuth Marine Sdn Bhd ('AMSB') yang memegang 80% saham dan Nautilus Supreme Sdn Bhd ('NSSB') yang memegang 20% saham. Defendan
C juga memberi perkhidmatan kapal tunda pelabuhan untuk satu projek oleh Vale Malaysia Minerals Sdn Bhd ('Vale'). Pertikaian timbul antara pemegang saham majoriti, AMSB, dan pemegang saham minoriti, NSSB, pada asasnya akibat ketakpercayaan dan anggapan ketiadaan ketelusan. Rayuan-rayuan ini, Rayuan 31 dan Rayuan 32, berbangkit daripada dua permohonan kebenaran
D untuk memulakan tindakan terbitan bagi pihak defendan. Dalam Rayuan 31, fakta adalah bahawa, pada 11 April 2013, defendan memasuki satu perjanjian dengan Vale, pelanggan tunggal defendan, untuk mencarter tujuh kapal tunda pelabuhan yang dimiliki defendan. Defendan memasuki perjanjian dengan Azimuth Ship Management Sdn Bhd ('ASM'), melantik ASM sebagai
E pengurus kapal yang ditetapkan untuk menguruskan dan mengendalikan penundaan pelabuhan dan memberi perkhidmatan penundaan pelabuhan bagi pihak defendan selama 15 tahun. Pemegang saham utama ASM adalah Dato' Suresh, yang juga salah seorang penama AMSB. Apabila salah satu kapal tunda pelabuhan, NTT Lumut, yang diuruskan oleh ASM dan dicarter
F kepada Vale, karam, Lembaga Pengarah defendan ('Lembaga'), dimaklumkan tentang insiden tersebut dan juga dilaporkan bahawa Vale, Jabatan Marin dan syarikat-syarikat insurans telah memulakan siasatan mereka yang menunjukkan bahawa insiden tersebut adalah satu 'kemalangan'. Perkara yang menjadi aduan plaintif adalah keengganan
G Lembaga menyetujui cadangan awal plaintif untuk satu siasatan bebas berkaitan NTT Lumut yang karam. Plaintif melantik Alan Loynd ('Loynd') dari Branscombe Marine Consultant Ltd di Hong Kong, yang memberikan laporan awalan berkaitan insiden tersebut. Walau bagaimanapun, apabila Lembaga kemudian bersetuju untuk melantik juruukur untuk membuat siasatan bebas, aduan plaintif bertukar pada keengganan Lembaga menyetujui
H cadangan baharu plaintif untuk melantik pakar bebas berasingan, masing-masing oleh pengarah-pengarah majoriti dan minoriti. Oleh sebab tiada prosiding guaman dimulakan oleh defendan terhadap ASM, plaintif memfailkan permohonan untuk kebenaran memulakan prosiding terhadap ASM atas nama defendan bawah ss. 347 dan 348 Akta Syarikat 2016
I ('Akta'). Menentang permohonan, defendan menghujahkan bahawa plaintif tidak bertindak secara suci hati dan bahawa tindakan undang-undang terhadap ASM bukan dalam kepentingan terbaik defendan atas alasan, antara

lain, tindakan undang-undang sebegitu akan gagal kerana defendan telah berjaya menuntut bawah polisi-polisi insuransnya untuk kerugian yang dialami akibat NTT Lumut yang karam. Mahkamah Tinggi memutuskan bahawa permohonan kebenaran oleh plaintif bawah s. 348 Akta adalah pramatang, antara lain, kerana Lembaga *prima facie* dalam kedudukan terbaik untuk menentukan apa yang terbaik untuk defendan. Atas rayuan, Mahkamah Rayuan menolak rayuan plaintif dan mengesahkan keputusan Mahkamah Tinggi menolak kebenaran untuk memulakan tindakan terbitan.

Dalam Rayuan 32, defendan memasuki perjanjian jual beli ('PJB') dengan Shin Yang Shipyard Sdn Bhd ('SYS') pada 12 April 2013, iaitu SYS bersetuju untuk membina, menjual dan menyerahkan tujuh kapal tunda kepada defendan seperti yang diperlukan oleh Vale, untuk jumlah USD68.5 juta ('keseluruhan harga belian'). Satu perjanjian dimasuki antara defendan dan Export-Import Bank of Malaysia Berhad untuk membiayai 70% keseluruhan harga belian kapal tunda tersebut. Pemegang-pemegang saham bersetuju bahawa baki 30% keseluruhan harga belian ('baki harga belian') berjumlah USD20,550,000 akan dibiaya melalui pendahuluan pemegang saham defendan ('pendahuluan pemegang saham') yang akan dianggap sebagai hutang tertunggak daripada defendan kepada pemegang saham, dan defendan akan membayar faedah pada kadar 7% atas pendahuluan pemegang saham ('faedah pemegang saham') yang akan dibayar kepada dua pemegang sahamnya, AMSB dan NSSB, berdasarkan jumlah yang dibayar. Pada 16 Disember 2012, Dato' Suresh memberi plaintif pecahan pendahuluan pemegang saham yang menunjukkan defendan hanya memerlukan daripada pemegang saham, sejumlah USD12,370,000 dan bahagian NSSB adalah USD1,864,176, yang perlu dibayar dalam lima ansuran dan bakinya akan dibayar oleh AMSB. Walau bagaimanapun, kira-kira di awal 2015, Dato' Suresh membincangkan penurunan jumlah akhir yang perlu dibayar kepada SYS, Oleh itu, NSSB tidak diperlukan membayar ansuran kelima, dan telah hanya membayar empat ansuran berjumlah RM4,998,882.52. Walau bagaimanapun, plaintif kemudian dimaklumkan tentang percanggahan berkaitan bayaran baki harga belian kepada SYS. Didapati bahawa jumlah melebihi RM90 juta telah ditunjukkan dalam akaun defendan yang diaudit sebagai pendahuluan pemegang saham. Permintaan pengarah-pengarah minoriti untuk jawapan daripada defendan ditolak. Plaintif kemudian memperoleh perintah agar akaun-akaun dan rekod-rekod defendan yang lain dibuka untuk pemeriksaan ('perintah pemeriksaan') dan berikutan itu, juruaudit, Tetuan Crowe Horwath ('Crowe Horwath') membuat pemeriksaan dan menyediakan tiga laporan, laporan awalan, laporan tambahan dan laporan susulan ('laporan Crowe Horwath'). Ketiga-tiga laporan tersebut secara pentingnya menunjukkan bahawa terdapat kekurangan apa-apa keterangan bebas dan boleh dipercayai untuk menyokong bayaran kira-kira USD19.9 juta yang direkodkan dalam buku-buku defendan sebagai pendahuluan pemegang saham oleh AMSB. Walaupun ada perintah

pemeriksaan, rekod-rekod akaun penuh tidak dikemukakan pada Crowe Horwath. Plaintif kemudian meneruskan dengan permohonan kebenaran untuk memulakan tindakan terbitan bawah s. 348 Akta bagi pihak defendan demi memutuskan defendan-defendan andaian bertanggungan secara bersesama dan berasingan dan bertanggungjawab untuk faedah pemegang saham sejumlah RM14,619,166.47 yang dibayar oleh defendan kepada AMSB dan NSSB berdasarkan pendahuluan pemegang sahan yang tidak disokong sewajarnya oleh apa-apa dokumen. Mahkamah Tinggi memutuskan bahawa plaintif gagal memenuhi prasyarat bawah s. 348 Akta untuk memperoleh kebenaran memulakan tindakan terbitan bagi pihak defendan. Atas rayuan, Mahkamah Rayuan, memutuskan bahawa plaintif telah memenuhi ambang pembuktian suci hati dan kepentingan terbaik defendan agar kebenaran diberi untuk memulakan tindakan terbitan.

Diputuskan (menolak kedua-dua rayuan dengan kos; mengesahkan keputusan Mahkamah Rayuan)

Oleh Harmindar Singh Dhaliwal HMP menyampaikan penghakiman mahkamah:

(1) Plaintif tidak mungkin mempercayai secara jujur bahawa kausa tindakan yang sewajarnya timbul dan ada prospek kejayaan munasabah. Laporan Loynd, yang menjadi sandaran besar perayu, tidak lengkap dan tidak muktamad dan oleh itu, tidak boleh menjadi asas kepercayaan sedemikian. Loynd tidak mempunyai keterangan yang mencukupi untuk menjelaskan sepenuhnya insiden tersebut dan semata-mata 'perasaan' bahawa insiden tersebut sepatutnya boleh dielak.

(2) Seorang pemohon perlu memastikan bahawa permohonan untuk kebenaran tidak dibawa untuk tujuan kolateral. Pemohon tiada sifat suci hati jika mempunyai tujuan kolateral yang bermaksud penyalahgunaan proses kecuali jika pemohon membuktikan itu adalah cukup konsisten dengan tujuan memberi keadilan untuk syarikat. Adalah munasabah untuk plaintif memohon satu siasatan bebas berkaitan NTT Lumut yang karam dan tiada apa-apa yang mencurigakan yang boleh dikaitkan dengan plaintif kerana mendesak untuk siasatan bebas kerana Dato' Suresh, sebagai pemilik ASM, berada dalam kedudukan berkonflik. Oleh itu hujahan berkaitan tujuan kolateral gagal. Walau bagaimanapun, jelas bahawa plaintif gagal membuktikan suci hati.

(3) Wujud pertimbangan komersial sebenar untuk defendan tidak meneruskan dengan tindakan tersebut. Adalah penting bahawa Vale, sebagai pelanggan tunggal defendan, tidak berniat untuk ditarik masuk dalam pertikaian itu, kerana itu mungkin akan menjejaskan hubungan antara defendan dan Vale, dan semestinya bukan dalam kepentingan terbaik defendan untuk kebenaran diberi. Defendan juga telah dibayar sejumlah USD153,002.18 dan kira-kira USD1.5 juta, masing-masing bawah polisi-polisi insurans. Selanjutnya, Lembaga sebulat suara

memutuskan untuk memasuki perjanjian tambahan dengan Vale untuk membatalkan carter NTT Lumut untuk jumlah USD3.5 juta dibayar oleh Vale kepada defendan. Laporan Tetuan Parker Randall juga menyimpulkan bahawa pendapatan bersih daripada hasil insurans dan pampasan daripada Vale adalah lebih tinggi berbanding dengan penerusan operasi kapal itu. Oleh itu, jika tindakan undang-undang berjaya sekalipun, itu mungkin kemenangan yang membawa kerugian untuk defendan. Oleh itu, plaintif tidak mungkin boleh dikatakan bertindak secara suci hati dan *prima facie* bukan demi kepentingan terbaik defendan untuk kebenaran diberikan.

(4) Berkaitan Rayuan 32, tiada dokumen untuk membuktikan jumlah yang dikatakan telah dibayar oleh AMSB sebagai pendahuluan pemegang saham. Tiada dokumen untuk membuktikan bahawa defendan bersetuju membenarkan AMSB membuat bayaran terus kepada SYS bagi pihaknya. Laporan awalan Crowe Horwarth menunjukkan ketiadaan rekod-rekod dan dokumen-dokumen berkaitan pendahuluan pemegang saham. Laporan tambahan mengesahkan dapatan itu dan menyatakan bahawa 'unavailability or non-keeping of the above-mentioned records and documents raises grave concern over the manner in which the management maintain their accounting records'. Laporan susulan menyimpulkan bahawa 'the veracity of the financial statements is called into question' kerana jumlah USD19.9 juta sebagai pendahuluan pemegang saham jelas tidak disokong dengan dokumen-dokumen bayaran yang wajar. Juga, surat-surat daripada SYS mengakui penerimaan bayaran tidak menunjukkan identiti atau apa-apa butiran sekalipun tentang pembayar jumlah yang dirujuk dalam setiap surat tersebut, khususnya sama ada pembayar adalah defendan, AMSB atau pihak ketiga lain. Oleh itu, jelas bahawa plaintif telah memenuhi elemen 'suci hati' berkaitan komponen subjektif kepercayaan jujur bahawa kausa tindakan yang baik wujud dan mempunyai prospek kemenangan yang munasabah, juga komponen objektif kepercayaan jujur bahawa seorang yang waras dalam keadaan tersebut akan mempunyai pemikiran sedemikian.

(5) Tindakan plaintif, walau apa pun, tidak boleh dikatakan sebagai membalas dendam, tetapi bersebab dan munasabah. Tidak boleh dikatakan bahawa plaintif memutarbelitkan pertikaian tersebut dan dan terdorong untuk mengalihkan dan menjatuhkan defendan. Plaintif berhak memohon jawapan tentang bagaimana bayaran kepada SYS dibuat. Apabila jawapan yang diterimanya hanya bahawa SYS mengesahkan penerimaan bayaran penuh tanpa memberi apa-apa dokumen tentang bagaimana SYS dibayar, sesiapa sahaja dalam kedudukan plaintif akan mendesak untuk jawapan. Oleh itu, elemen 'suci hati' telah dibuktikan apabila komponen-komponen subjektif dan objektif kepercayaan secara jujur berserta ketiadaan tujuan kolateral

terbukti.

(6) Defendan terbeban dengan hutang yang langsung tidak disahkan dan disokong melebihi RM90 juta yang mengakibatkan berjuta-juta wang faedah pemegang saham berterusan dibayar oleh defendan. Oleh itu, defendan akan menerima faedah besar dalam bentuk kewangan apabila dilepaskan daripada hutang melalui tindakan terbitan yang dicadangkan jika tindakan terbitan itu berjaya. Jika tindakan tersebut berjaya, defendan juga akan memperoleh kembali faedah pemegang saham yang telah dibayar defendan kepada NSSB dan AMSB. Tidak mungkin tindakan terbitan yang dicadangkan akan mengalihkan perhatian defendan daripada perniagaan menguntungkan dengan Vale kerana pihak-pihak sedar sepenuhnya fakta kes tersebut.

(7) Tidak semestinya kebenaran akan ditolak jika remedi alternatif wujud untuk menebus rugi pertikaian tersebut. Kewujudan remedi alternatif hanya sebagai faktor yang akan dipertimbangkan mahkamah berkaitan elemen 'kepentingan terbaik syarikat'. Walau bagaimanapun, hujahan tentang remedi alternatif kurang berkesan dalam kes ini kerana perintah pemeriksaan yang diperoleh plaintif gagal menghasilkan keputusan konkrit.

(8) Prinsip berkaitan 'tangan bersih' atau 'orang yang sewajarnya' atau sama ada seorang patut mempunyai kawalan atas prosiding terbitan lebih terkait dengan tindakan terbitan common law berhubung isu *locus standi* untuk memulakan tindakan terbitan. Tindakan terbitan common law telah digantikan dengan tindakan terbitan statutori bawah ss. 347 dan 348 Akta, iaitu, prinsip bawah common law, iaitu, pengualian berakar umbi dalam kaedah dalam kes *Foss v. Harbottle* tidak lagi terpakai untuk permohonan kebenaran bawah s. 348 Akta. Dalam konteks sama, oleh sebab s. 345 Akta telah memperuntukkan secukupnya definisi untuk pengadu yang boleh, dengan kebenaran mahkamah, memulakan, campur tangan atau membela prosiding bagi pihak syarikat, adalah kurang sesuai untuk menyandar pada prinsip berkaitan 'tangan bersih' untuk menentukan sama ada seorang pemohon adalah plaintif yang wajar kerana prinsip itu lebih selari dengan tindakan terbitan common law.

(9) Seorang pemohon tidak akan hilang kelayakan memulakan tindakan terbitan untuk faedah syarikat jika dia akan mendapat apa-apa faedah daripada tindakan itu. Apa yang lebih penting adalah pemohon tersebut tidak boleh mengejar tujuan tersembunyi yang tidak terkait dengan perkara tuntutan dan, jika bukan kerana tujuan tersembunyi, dia tidak akan memulakan langsung prosiding tersebut. Mahkamah Tinggi terkhilaf apabila memutuskan bahawa plaintif terlibat dalam kesalahan yang didakwa kerana dia meluluskan bayaran faedah pemegang saham. Ini bertentangan dengan keterangan tak boleh sangkal bahawa selepas

Julai 2017, plaintif dan Dato' Mohamed Yaacob, pengarah minoriti, telah berhenti meluluskan bayaran pendahuluan faedah pemegang saham. Selepas mengetahui tentang percanggahan dan barangkali pendahuluan pemegang saham yang meragukan, tanpa sokong dokumen-dokumen relevan, mereka telah menangguhkan dan enggan meluluskan pembayaran balik keluar selanjutnya daripada faedah pemegang saham sehingga isu-isu tersebut diselesaikan. Oleh itu, elemen 'suci hati' dan 'kepentingan terbaik syarikat' seperti yang diperlukan bawah s. 348(4) Akta dipenuhi dan dengan itu, rayuan tidak boleh berjaya.

Case(s) referred to:

Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 4 CLJ 551 CA ***(refd)***
Ang Thiam Swee v. Low Hian Chor [2013] 2 SLR 340 ***(refd)***
Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak [2010] 7 CLJ 808 CA ***(refd)***
Fiduciary Ltd v. Morningstar Research Pty Ltd (2005) 53 ACSR 732 ***(refd)***
Foss v. Harbottle [1843] 67 ER 189 ***(refd)***
Fothergilt v. Monarch Airlines Ltd [1981] AC 251 ***(refd)***
Independent Oil Tools Ltd v. Dato' Ramli Md Nor & Ors [2018] 5 CLJ 706 HC ***(refd)***
Lesini v. Westrip Holdings Ltd [2010] BCC 420 ***(refd)***
Mackenzie v. Craig [1997] 205 AR 363 ***(refd)***
Maher v. Honeysett & Maher Electrical Contractors Pty Ltd [2005] NSWSC 859 ***(refd)***
Nurcombe v. Nurcombe & Anor [1985] 1 All ER 65 ***(refd)***
Ong Keng Huat v. Fortune Frontier (M) Sdn Bhd & Anor [2015] 10 CLJ 599 HC ***(refd)***
Pang Yong Hock & Anor v. PKS Contracts Services Pte Ltd [2004] 3 SLR(R) 1 ***(refd)***
Re F & S Express Ltd [2005] 4 HKLRD 743 ***(refd)***
Re Myway Ltd [2008] 3 HKLRD ***(refd)***
Swansson v. R A Pratt Properties Pty Ltd & Anor [2002] 42 ACSR 313 ***(refd)***
Towers v. African Tug Company [1904] 1 Ch 558 ***(refd)***

Legislation referred to:

Companies Act 1965 (repealed), ss. 181A(3), 181B, 181E
Companies Act 2016, ss. 345, 347(2), (3), 348(4)(b), 350
Rules of Court 2012, O. 53

Business Corporation Act 1985 [Canada], s. 239(2)
Companies Act 1967 [Sing], s. 216A
Companies Act 2006 [UK], s. 263(3)
Corporation Act 2001 [Aust], s. 237

Other source(s) referred to:

Loh Siew Cheang, *Corporate Powers Accountability,* 3rd edn, paras 11-54

(Civil Appeal No: 02(f)-31-04-2022(W))

For the appellant - Lim Chee Wee, Lee Shih, Raphael Kok Chi Ren, Jasper Tan Li Jen, Wee Hee & Lee Suan Cui; M/s Lim Chee Wee Partnership

For the respondent - Cyrus V Das, David Thomas Mathews, Olivia Loh, Nirvan Gopalan-Krishnan & Lai Ann Xing; M/s Gananathan Loh

A *(Civil Appeal No: 02(f)-32-04-2022(W)*
For the appellant - Cyrus V Das, David Thomas Mathews, Olivia Loh, Nirvan Gopalan-Krishnan & Lai Ann Xing; M/s Gananathan Loh
For the respondent - Lim Chee Wee, Lee Shih, Raphael Kok Chi Ren, Jasper Tan Li Jen, Wee Hee & Lee Suan Cui; M/s Lim Chee Wee Partnership

B *[Editor's note: For the Court of Appeal judgment, please see Dato' Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd [2022] 8 CLJ 529 (affirmed); For the High Court judgment, please see [2019] CLJU 1452; [2019] 1 LNS 1452 (overruled).]*

Reported by S Barathi

C **JUDGMENT**

Harmindar Singh Dhaliwal FCJ:

Introduction

[1] There were two appeals before us. They revolve around issues
D pertaining to derivative actions brought under the Companies Act 2016 ("CA 2016"). These issues, as will become apparent later, are of great importance to directors and shareholders of companies. These issues arise where a wrong has been committed against the company. And sometimes when the wrongdoer is in control, no action can seemingly be taken to
E protect the interests of the company.

[2] The appeals were ordered to be heard together. They were appeals nos. 02(f)-31-Q4-2022(W) and 02(f)-32-04-2022(W). We will refer to them as Appeal 31 and Appeal 32 respectively in this judgment.

F **[3]** The appeals arise out of the grant of leave by this court on the following questions of law:

Appeal 31

Despite the abrogation by way of the Companies Act, 2016, s. 347(3) of a complainant's right to bring a derivative action under common law,
G whether the principles under common law *viz* the well entrenched exceptions to the rule in *Foss v. Harbottle* continue to apply for leave applications pursuant to s. 348. ("question 1")

Whether in determining an application for leave under s. 348:

H (i) the test to be applied by the court is similar to the long-established test to commence judicial review proceedings under Rules of Court, 2012, O. 53, namely, that the application must not be frivolous; and

(ii) the jurisprudence developed in such proceedings apply. ("question 2")

I If the answers to questions 1 and 2 are in the negative, what are the relevant principles to guide the High Court when determining an application for leave under s. 348? ("question 3")

In any event, what are the relevant principles guiding the High Court when determining "good faith" and "best interest of the company" within the meaning of s. 348(4)? ("question 4")

Appeal 32

Whether on a proper construction of s. 348(4) of the Companies Act 2016, the conjunctive elements of 'good faith' and 'best interest of the company' are to be objectively assessed on a collective basis before leave to commence a derivative action can be granted to a minority shareholder to sue the majority shareholder in the name of the company? (question 1)

In the assessment of the principles set out in s. 348(4) of the Companies Act 2016 for leave to be granted especially of the element of 'best interest of the company', whether the court is obliged to consider the overarching factor of whether the proposed action would be counter-productive to the company's interest and whether it outweighs the complaint of the minority shareholder? (question 2)

Whether the common law principles laid down in:

(i) the English Court of Appeal case of *Nurcombe v. Nurcombe & Anor* [1985] 1 All ER 65;

(ii) the English Court of Appeal case of *Towers v. African Tug Company* [1904] 1 Ch 558; and

(iii) the Supreme Court of New South Wales case in *Swansson v. R A Pratt Properties Pty Ltd & Anor* [2002] 42 ACSR 313;

are applicable to preclude an applicant under ss. 347 and 348 of the Companies Act 2016 from being the proper party to file and/or have control of the derivative action having been a direct and knowing participant of the alleged complaint or having received a benefit which he now complains? (question 3)

In considering the element of 'good faith' under s. 348(4) of the Companies Act 2016, whether the court is to judge the motive of the applicant solely by the purported objective that is sought to be achieved by the applicant instead of the hostilities and vendetta between the disputant parties? (question 4)

To what extent does the court consider the level of hostilities and vendetta between the parties to be sufficient to affect the applicant's good faith or raise a presumption of a collateral purpose?

(i) does it require the defendant/respondent to demonstrate that the vendetta of the parties has led to vilification and a pursuit of personal gains?

(ii) or is it sufficient to show that the applicant is motivated by vendetta, perceived or real, as set out in *Pang Yong Hock & Anor v. PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1? (question 5)

Whether by reason of the abolition of the common law derivative action (s. 347(3) of the Companies Act 2016) and its replacement with a filter system (s. 348(4) of the Companies Act 2016) the principle of last resort applies such that leave would be refused by the court to permit a minority shareholder to sue the majority shareholder in the name of the company if an alternative remedy is available to redress the complaint of the minority shareholder? (question 6)

Where a dispute arises between shareholders as to whether a shareholder has made its proportionate contribution towards the purchase of the company's assets, and seeks proof of the same, whether such a dispute could legitimately form the basis of a derivative action under ss. 347 or 348 of the Companies Act 2016; in this regard whether the court is obliged to consider the fact of alternative remedies available to the complaining shareholder *in lieu* of a derivative suit in the name of the company, namely of a shareholder's action *inter se* under the shareholders' agreement between them? (question 7)

[4] After hearing the appeals on several hearing dates, both appeals were unanimously dismissed, and the decisions of the Court of Appeal ("COA") accordingly affirmed. We now set out our reasons for doing so. For convenience, we will first set out our assessment of the law relating to derivative actions as submitted by the parties. We will then discuss the application of the law to the facts in each appeal.

The Law On Derivative Actions

[5] Both parties had submitted extensively on the legal principles that apply in relation to derivative actions. The submission on the applicable legal principles was connected to the several leave questions put forward by both parties who contended that the issues raised had never been considered by the apex court. As mentioned earlier, we will, at the outset, consider the legal position on the various issues raised before applying them to the facts in each appeal.

[6] As background, it is first necessary to allude to the cardinal principles of corporate law as laid down in *Foss v. Harbottle* [1843] 67 ER 189, namely, (i) the proper plaintiff rule and (ii) the principle of majority rule. In a nutshell, the former rule meant that only a company could sue for a wrong done to the company as it was a separate legal entity distinct from its members. So, it is generally not permissible for others to sue on behalf of the company.

[7] The latter rule, or the majority rule, dictates that the minority are bound by the lawful decisions of the majority. In this way, the court does not interfere in corporate affairs where matters are within the prerogative of the board of directors that manage the company.

[8] Of course, there may arise some difficulties with the application of these principles such as when the circumstances are such that the company is unable to seek redress for wrongs done to it. The classic situation typically is when the alleged wrongdoers are in control of the company, and they use that position to disallow any legal action to be commenced against them by the company. Such circumstances are commonly referred to as "fraud on the minority" and "wrongdoers in control". In such cases, it would be untenable for the courts to adopt a stance of non-interference merely because of the twin principles in *Foss v. Harbottle*.

[9] So, in cases of "fraud on the minority" and "wrongdoers in control", the courts of equity created a procedural device by which a minority shareholder could pursue legal action in a representative capacity for and on behalf of the company. Such proceedings came to be known as derivative actions. Gopal Sri Ram JCA (as he then was), in *Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 4 CLJ 551; [1995] 3 MLJ 417 ("*Abdul Rahim Aki*"), set out the procedural elements in common law derivative actions, if the procedural requirements were not met, the action is liable to be struck out as being frivolous and vexatious. So, for example, the wrongdoers in control and the company must be cited as defendants.

[10] It turned out that the courts were quite stringent in insisting that these procedural safeguards developed by the courts be strictly adhered to. Procedural compliances aside, there was a high threshold on the merits which had to be surmounted for a derivative action to succeed. Decided cases suggest the need to carefully evaluate ail the evidence before coming to a finding that there was "fraud on the minority" and the "wrongdoers in control".

[11] Now, for a long time, aggrieved parties had to rely on these common law principles to commence an action to seek redress for a wrong done to a company or to recover debts or damages that were claimed to be due to a company. There arose some controversy as to whether a plaintiff could establish that he or she came within one of the accepted exceptions to the "proper plaintiff" rule in *Foss v. Harbottle* (*supra*). Our Companies Act 1965 ("CA 1965") which is the predecessor of the CA 2016 originally did not contain express provisions regarding derivative actions.

[12] It was only in 2007 that statutory provisions regarding derivative actions were first introduced through the Companies (Amendment) Act 2007 by inserting ss. 181A to 181E into the CA 1965. Subsequently, ss. 181A to 181E of the CA 1965 were replaced with ss. 345, 347 to 350 of the CA 2016.

A However, the provisions were substantially the same except for one material difference between s. 181A(3) of the CA 1965 and s. 347(3) of the CA 2016, whereby the latter has abrogated the right to bring, intervene in, defend or discontinue derivative action at common law. For convenient reference, ss. 345, 347 to 350 of the CA 2016 are reproduced below:

B **Interpretation**

345. For the purposes of this Division, "complainant" means:

(a) a member of a company, or a person who is entitled to be registered as a member of a company;

C (b) a former member of a company if the application relates to the circumstances in which the member ceased to be a member;

(c) any director of a company; or

(d) the Registrar, in the case of a company declared under section 590.

D ...

Derivative proceedings

347(1) A complainant may, with the leave of the Court initiate, intervene in or defend a proceeding on behalf of the company.

E (2) Proceedings brought under this section shall be brought in the company's name.

(3) The right of any person to bring, intervene in, defend or discontinue any proceedings on behalf of a company at common law is abrogated.

Leave of Court

F 348(1) An application for leave of the Court under section 347 shall be made to the Court without the need for an appearance to be entered.

(2) The complainant shall give thirty days' notice in writing to the directors of his intention to apply for the leave of Court under section 347.

G (3) Where leave has been granted for an application under section 347, the complainant shall initiate proceedings in Court within thirty days from the grant of leave.

(4) In deciding whether or not the leave shall be granted, the Court shall take into account whether:

H (a) the complainant is acting in good faith; and

(b) it appears *prima facie* to be in the best interest of the company that the application for leave be granted.

(5) Any proceedings brought, intervened in or defended under this section shall not be discontinued, compromised or settled except with the leave I of the Court.

Effect of ratification

349. If members of a company, ratify or approve the conduct of the subject matter of the action:

(a) the ratification or approval does not prevent any person from bringing, intervening in or defending proceedings with the leave of the Court;

(b) the application for leave or action brought or intervened in shall not be stayed or dismissed by reason only of the ratification or approval; and

(c) the Court may take into account the ratification or approval in determining what order to make.

Powers of the Court

350. In granting leave under this section and sections 347 and 348, the Court may make such other orders as the Court thinks appropriate including an order:

(a) authorizing the complainant or any other person to control the conduct of the proceedings;

(b) giving directions for the conduct of the proceedings;

(c) for any person to provide assistance and information to the complainant, including to allow inspection of the company's books;

(d) requiring the company to pay reasonable legal fees and disbursements incurred by the complainant in connection with the application or action, or pending the grant of the leave or pending the grant of any injunction by the Court hearing the application for leave under this section; or

(e) the costs of the complainant, the company or any other person for proceedings taken under this section, including an order as to indemnity for costs.

[13] A brief appreciation of the legislative history in respect of derivative action was discussed and outlined in the case of *Independent Oil Tools Ltd v. Dato' Ramli Md Nor & Ors* [2018] 5 CLJ 706; [2018] MLJU 133 (HC) ("*Independent Oil Tools*") as follows:

[7] Prior to 2007, there was no statutory right to commence a derivative action on behalf of a company. Aggrieved parties had therefore to rely on the common law in order to commence an action to seek redress for a wrong done to a company or to recover debts or damages that were claimed to be due to a company. A putative plaintiff had to show that it came within one of the accepted exceptions to the "proper plaintiff" rule in *Foss v. Harbottle* (1843) 2 Hare 461.

A [8] The Companies (Amendment) Act 2007 introduced many new provisions, chief among which were substantial (and much needed) modifications to directors' duties. A new section 181A was also introduced, which created a statutory right to commence a derivative action. The common law right was however preserved.

B [9] The recently introduced Companies Act 2016 maintains the substance of the previous sections 181A to 181E of the Companies Act 1965, with one critical difference: the common law right to commence or defend a derivative action has now been abrogated.

[10] The right to initiate, intervene in, or to defend a proceeding on behalf of a company is granted (and granted exclusively) under section 347 to C a "complainant". Section 345 defines a complainant to include a member of a company, a person who is entitled to be registered as a member of a company, a former member of a company (if the application relates to the circumstances in which the person ceased to be a member), a director of a company and the Chief Executive Officer of the Companies D Commission of Malaysia in the case of companies whose affairs are under investigation under section 590.

[14] The High Court in the same case of *Independent Oil Tools* also sought to explain the scope of ss. 347 and 348 of the CA 2016 in the following terms:

E [11] Leave of court must first be obtained before a derivative action may be commenced. The proceedings that were before this court were to obtain the leave that was required under section 347(1) of the Companies Act 2016. Under section 348(2), the complainant must give 30 days' notice in writing to the directors of his intention to apply for leave of court. Once leave has been obtained, the complainant has 30 days from the date on F which leave was granted to commence the proceedings in the name of the company.

[12] In exercising its discretion whether or not to grant leave to the complainant to commence a derivative action, the court must consider whether the complainant is acting in good faith and whether it appears G *prima facie* to be in the best interest of the company that the application for leave be granted: section 348(4).

[15] As clearly demonstrated above, under the current regime of the CA 2016 in relation to derivative actions, a complainant may, with leave of the court, initiate, intervene in or defend a proceeding on behalf of the company. H Its scope is wide in spectrum where a complainant is not just confined to the members of the company. It also extends to persons who are not members but entitled to be registered as one as well as former members, directors and the Registrar of the Companies. Further, the new provisions required the court, in deciding whether to grant leave, to determine the twin factors of I whether the complainant is acting in good faith and whether it appears *prima facie* to be in the best interest of the company.

Abrogation Of Common Law Derivative Proceedings

[16] With that background, we come now to the relevant issues that arise from the questions of law set out at the outset. The first issue is whether s. 347(3) of the CA 2016 ought to be construed as having set up the statutory derivative action to replace and abolish the common law derivative rights under the exceptions to the rule in *Foss v. Harbottle*. In this respect, we think there cannot be any doubt of the abrogation of the common law derivative proceedings. This is plain from s. 347(3) itself as well as the recommendations of the Corporate Law Reform Committee ("CLRC").

[17] In the review of the Companies Act 1965 – final report prepared by the CLRC for the purpose of reviewing and recommending changes to the CA 1965, recommended the abolishment of derivative action at common law to "provide certainty and clarity to the law". The relevant passages extracted from the said final report are reproduced below:

> **Recommendation 2.41**
>
> The CLRC recommends that the common law derivative action should be replaced by the statutory derivative action.
>
> ...
>
> 13.02 Nonetheless, there are notable differences between the recommendations of the CLRC in relation to the statutory derivative action and section 181A of the Companies Act 1965. One of the issues deliberated on by the CLRC in CD 6 was whether the common law remedy that allows a member to sue on behalf of the company should be retained. The CLRC received strong support from respondents on the recommendation against the retention of the common law derivative action. Thus, *the CLRC strongly recommends that the common law derivative action should be replaced by the statutory derivative action as this approach will provide certainty and clarity to the law.* (emphasis added)

[18] Now, such reports can be used by the courts as guidance to discover the mischief that the piece of legislation intended to remedy. In *Fothergilt v. Monarch Airlines Ltd* [1981] AC 251 (HL), Lord Diplock speaking in the House of Lords had occasion to hold:

> Where the Act has been preceded by a report of some official commission or committee that has been laid before Parliament and the legislation is introduced in consequence of that report, the report itself may be looked at by the court for the limited purpose of identifying the "mischief" that the Act was intended to remedy, and for such assistance as is derivable from this knowledge in giving the right purposive construction to the Act.

[19] It is therefore clear that common law derivative action has now been displaced by the statutory regime under the CA 2016 which in itself carries different requirements to be met. As mentioned earlier, such abrogation was intended to provide certainty to the law and dispense with the stringent

requirements under common law. That said, common law principles to the consideration for satisfying or interpreting the statutory elements of 'good faith' and the 'best interest of the company' within the meaning of s. 348 would still be relevant and applicable in the appropriate circumstances.

[20] In this context, it must be appreciated that the provisions governing derivative proceedings under the CA 2016 may be structured differently when compared to other jurisdictions such as Australia (s. 237, Australian Corporation Act 2001), Singapore (s. 216A Companies Act 1967), Canada (s. 239(2), Canada (Business Corporation Act 1985), and the UK (s. 263(3) Companies Act 2006). Nevertheless, there are certainly many common features such that case law from these jurisdictions may offer much assistance.

The Leave Threshold

[21] The second issue which merits consideration relates to the standard of review for assessing leave applications to initiate the statutory derivative action under s. 348 of the CA 2016. The dual elements of "good faith" and especially "it appears *prima facie* to be in the best interest of the company" in the application for leave under s. 348(4)(b) has generated some discussion as to the nature of the threshold required for leave to be granted.

[22] In this regard, we must at the outset observe that any form of assessment based on judicial review standards under O. 53 of the Rules of Court 2012 would be erroneous. Order 53 in itself is quite different and importantly does not have in any form the dual elements of "good faith" and "best interest of the company" as enunciated in s. 348(4). By having these dual elements in s. 348(4), it was plain that leave was not intended to be given lightly. An applicant must meet these requirements to establish his/her case for leave.

[23] Although at first blush the leave application seems interlocutory in nature, it is quite different from the requirement of leave in judicial review applications. The relief sought in s. 348 is in essence final in nature and cannot be revisited. Indeed, once leave is granted, the proceedings are brought in the name of the company (s. 347(2)). With the grant of leave, it vests extraordinary power in the applicant to represent and advance the company's interest. The court's role is therefore pivotal in ensuring that there is strict compliance with the statutory requirements.

[24] It cannot be gainsaid that the intention was to provide the right balance between on the one hand, protecting the company from wrongdoings committed against it and ensuring that only a proper complainant be allowed to bring and sustain a derivative action and, on the other hand, protecting a company from unmeritorious or unwarranted interference in the company's affairs by disgruntled complainants who were likely to abuse the statutory remedies. It is therefore unfortunate that some courts have adopted the approach that the grant of leave has to be assessed on a low threshold.

[25] Having said that, it would be more convenient, in our view, to consider the dual elements separately to assess how they are to be evaluated before any decision is made as to whether leave ought to be granted.

Meaning Of Good Faith

[26] Now, 'good faith' is not defined in the Act. The requirement of 'good faith' is then left to the discretion of the courts. Some guidance can be taken from jurisdictions which employ the 'good faith' test, in this way, the law in this regard is expected to grow incrementally with the increasing number of cases being heard by the courts with different facts and circumstances.

[27] It is however significant to note that unlike some other jurisdictions, the element of 'good faith' is a requirement or a pre-requisite under s. 348(4) of the Act and not merely a factor to be taken into account by the courts. It must be treated separately from the other pre-requisite of 'best interest' although factually the two pre-requisites may sometimes overlap. In other words, both the pre-requisites must be independently assessed before it can be said that the grounds for granting leave have been sufficiently established.

[28] The Court of Appeal in *Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak* [2010] 7 CLJ 808; [2011] 3 MLJ 636 ("*Celcom*") in following the Australian case of *Swansson v. RA Pratt Properties PTY Ltd & Anor* [2002] NSWSC 583; [2002] 42 ACSR 313 ("*Swansson*"), and correctly in our view, held that the onus of proof is on the applicant on a balance of probabilities. The court further held that the test of good faith is two-fold. One is an honest belief on the part of the applicant that a good cause of action exists and has a reasonable prospect of success and two, that the application is not brought up for a collateral purpose.

[29] Palmer J in *Swansson* identified at least two inter-related factors relevant in establishing 'good faith' in the following terms (at p. 320):

> [36] Nevertheless, in my opinion, there are at least two interrelated factors to which the courts will always have regard in determining whether the good faith requirement of s. 237(2)(b) is satisfied. The first is whether the applicant honestly believes that a good cause of action exists and has a reasonable prospect of success. Clearly, whether the applicant honestly holds such a belief would not simply be a matter of bald assertion: the applicant may be disbelieved if no reasonable person in the circumstances could hold that belief. The second factor is whether the applicant is seeking to bring the derivative suit for such a collateral purpose as would amount to an abuse of process.
>
> [37] These two factors will, in most but not all, cases entirely overlap: if the court is not satisfied that the applicant actually holds the requisite belief, that fact alone would be sufficient to lead to the conclusion that the application must be made for a collateral purpose, so as to be an abuse of process. The applicant may, however, believe that the company has a good cause of action with a reasonable prospect of success but

A nevertheless may be intent on bringing the derivative action, not to prosecute it to a conclusion, but to use it as a means for obtaining some advantage for which the action is not designed or for some collateral advantage beyond what the law offers. If that is shown, the application and the derivative suit itself would be an abuse of the court's process. ... The applicant would fail the requirement of s. 237(2)(b).

B

[30] We need to clarify that the case of *Celcom* was dealing with the now repealed CA 1965, in particular the repealed ss. 181A to 181B of the CA 1965. We would, however, note that the case of *Celcom* is still relevant and applicable to ss. 347 and 348 of the CA 2016 as they are *in pari materia* except on the point of applicability of the common law derivative action.

C

[31] Coming back to the two-fold test, in relation to the first factor, questions arise, as can be seen in the leave questions, as to whether the honest belief of the applicant is a purely subjective assessment. In the first place, where the applicant fails to establish that he has the requisite honest belief, it must follow that the application is made for a collateral purpose such that it is an abuse of process. Even if the applicant is able to demonstrate a legitimate case in the proposed action, it would not be in the best interests of the company if it is found that the applicant is not acting in good faith.

D

[32] Now, if, on the other hand, the applicant exhibits an honest belief, the court must carry out a further assessment to ascertain if the belief of the applicant is such that no reasonable person in the circumstances would hold that belief. In other words, it is a perverse belief such that it throws serious doubt as to the honest belief of the applicant in the first place. As stated by the New South Wales Supreme Court in *Maher v. Honeysett & Maher Electrical Contractors Pty Ltd* [2005] NSWSC 859 ("*Maher*"):

E

F

> [33] I do not take Palmer J, in *Swansson*, to have stipulated that there must be a sworn assertion by the applicant that he believes that a good cause of action exists and has reasonable prospects of success; rather, His Honour identified **a state of mind which must be found to exist in the applicant,** rather than any particular means by which that state of mind is to be proved. While in some cases the presence or absence of a sworn assertion of the relevant state of mind might be very important, generally speaking such statements – which by necessity will almost always be unqualified opinion founded on hearsay, since a lay applicant will rarely know whether or not a good cause of action exists, nor its prospects of success, and will be dependent upon the advice of lawyers for forming the relevant belief – must be of little weight or utility; **and the objective facts and circumstances will speak louder than the applicant's words.** Although in the context that there was also a "bald assertion", the approach adopted by Austin J in *Morningstar* illustrates this.
>
> (emphasis added)

G

H

I

[33] It may therefore be surmised that the test for assessing honest belief comprises of both subjective and objective components, namely whether the applicant honestly believes that a good cause of action exists and has a

reasonable prospect of success (subjective component), and the applicant may be disbelieved if no reasonable person in the circumstances could hold that belief (objective component).

[34] Dealing now with the second factor of collateral purpose, the Singapore Court of Appeal in *Ang Thiam Swee v. Low Hian Chor* [2013] 2 SLR 340 ("*Ang Thiam Swee*") considered that good faith was less dependent on the motives which trigger the application but more on the purpose of the proposed derivative action which must have a clear nexus with the company's benefits or interests. Even if the applicant had a collateral purpose, it must be sufficiently consistent with the objective of doing justice to the company.

[35] Of course, if it can be shown that an applicant is pursuing an ulterior purpose unrelated to the subject matter of the derivative action and that, but for his ulterior purpose, he would not have commenced such proceedings at all, that is an abuse of process. However, if the claimant brings a derivative claim for the benefit of the company, he will not be disqualified from doing so if there are other benefits which he will derive from the claim (see *Lesini v. Westrip Holdings Ltd* [2010] BCC 420). In other words, the presence of a private interest cannot necessarily negate good faith if the same coincides with that of the company (see *Ong Keng Huat v. Fortune Frontier (M) Sdn Bhd & Anor* [2015] 10 CLJ 599; [2015] 11 MLJ 604 ("*Ong Keng Huat*").

[36] Even in a case where there is a personal *animus* against the company, or other members of it, that cannot be significant, let alone decisive (see *Maher* (*supra*)). It is perhaps only in exceptional cases where the applicant is so motivated by vendetta, perceived or real, that his judgment will be clouded by purely personal considerations such that the court may find lack of good faith on his part (see *Pang Yong Hock & another v. PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 ("*Pang Yong Hock*")).

Best Interest Of The Company

[37] We come now to the second prerequisite, that is, whether it appears *prima facie* to be in the best interest of the company that leave be granted. This again raises the question of threshold or level of persuasiveness that an applicant has to discharge at leave stage.

[38] This question has been discussed in various jurisdictions. Although the provisions may differ slightly, it is useful to consider how the courts in those jurisdictions considered the threshold question. The High Court in *Ong Keng Huat* (*supra*) had occasion to consider the different formulations in other countries as compared to Malaysia. For example, in Singapore the relevant provision reads "appears to be *prima facie* in the interest", in Australia: "it is in the best interest" and in Canada it reads: "appears to be in the interest". In Hong Kong, the relevant preceding legislation contained the expression "*prima facie*" whilst the current law employs the term "on the face of the application".

[39] So, when looking at the case law in those jurisdictions, it is important to have in mind these differences although they may, in effect, be minor ones. A comparison of these formulations suggests to us that the most stringent requirement is the Australian provision as noted by Palmer J in the *Swansson* case.

[40] In this way, a requirement that the proposed action is in the best interests of the company is significantly different from one where the proposed action appears to be or is likely to be in the best interest of the company. In the latter case, as noted by Palmer J, the best interests of the company is considered only in a *prima facie* way. This observation is important as it makes the point that a *prima facie* consideration is not a stringent one. So, except for Australia, the differences in the other jurisdictions mentioned earlier are purely semantical in our view and the threshold burden is the same.

[41] We are therefore fortunate to have the advantage of considerable judicial opinion as to what the relevant provision "*prima facie*" entails when considering an application for leave. Without having to deal with the case law in detail at this point in the interest of brevity, the general approach of the courts is not to go into the merits of the case and conduct a mini trial but to consider whether the proposed action is legitimate and arguable.

[42] Of course, if the claim is considered frivolous or vexatious or devoid of merit, it will be rejected outright. In other words, there must be some reasonable chance of success such that if the claim is proved, the company will stand to gain substantially in financial terms. This avoids the necessity for the court at this stage to attempt any protracted resolution of the dispute as the threshold is not so high as to suggest that the applicant must succeed but only that there is a reasonable basis for the claim (see *Mackenzie v. Craig* [1997] 205 AR 363; *Re F & S Express Ltd* [2005] 4 HKLRD 743; *Re Myway Ltd* [2008] 3 HKLRD; *Ang Thiam Swee* (*supra*); *Ong Keng Huat* (*supra*)).

[43] Nevertheless, when it comes to commercial considerations, we associate ourselves with the following observation by the Singapore Court of Appeal in *Pang Yong Hock* (*supra*):

> [21] Having established that an applicant is acting in good faith and that a claim appears genuine, the court must nevertheless weigh all the circumstances and decide whether the claim ought to be pursued. Whether the company stands "to gain substantially in money or in money's worth" (per Choo JC in *Agus Irawan*) relates more to the issue of whether it is in the interests of the company to pursue the claim rather than whether the claim is meritorious or not. A $100 claim may be meritorious but it may not be expedient to commence an action for it. The company may have genuine commercial considerations for not wanting to pursue certain claims. Perhaps it does not want to damage a good, long-term, profitable relationship. It could also be that it does not wish to generate bad publicity for itself because of some important negotiations which are underway.

[44] In a similar vein, in Loh Siew Cheang, *Corporate Powers Accountability*, 3rd edn, the learned authors expressed the following view (at paras. 11 to 54):

> 11-54 Commercial considerations like substantial litigation expenses, risk of damage to company's reputation and uncertainty of the putative defendants' ability to satisfy any judgment obtained against them are relevant in the determination of the 'interest of the company' requirement. Further, the board's assessment of these considerations will be given due weight by the Court, in particular, if the board has made a bona fide commercial decision that it is not in the interests of the company to commence the proceedings, the Court will be slow to intervene.

[45] The learned authors also go on to state at para. 11 to 55 that if, on the other hand, the board of director's decision is likely questionable and the intended action was to be brought against the directors for their misconduct, then less weight should be accorded to the Board's view in balancing the factors. So, it is possible, as the facts of this case will later show, that the company may have genuine commercial considerations for not wanting to pursue certain claims in the circumstances when it does not want to damage a good, long-term, profitable relationship, and that it does not wish to generate bad publicity for itself because of some important negotiations which are underway.

[46] In the end the question of whether it is *prima facie* in the best interest of the company to bring an action is a wide one involving consideration of factors beyond the merits of the proceedings. So, broadly speaking, apart from the prospects of success of the action, other factors are the likely costs of the action including legal fees, likely recovery if the action is successful and likely consequences to the company if the action is unsuccessful.

[47] We have in the foregoing endeavoured to deal with the law as raised by the parties in respect of most of the leave questions. In that regard, we have done so in a broad fashion and we will need to come back to these broad propositions when we next deal with the facts and issues raised in the two appeals. Of necessity, we have left out a discussion on some questions of law which, in our view, were not relevant to the outcome of each appeal. These questions will have to be considered in some other future case.

Material Facts

[48] We now come to the material facts relevant to both appeals. These facts are gathered from the submissions of the parties and from the grounds of judgment of the courts below. They can be restated as follows.

[49] In these two appeals, Dato' Seri Timor Shah Rafiq ("the plaintiff") is a director of Nautilus Tug & Towage Sdn Bhd ("the defendant"), which is a joint venture company set up to build, own and manage tug boats. The

defendant was owned by Azimuth Marine Sdn Bhd ("AMSB") and Nautical Supreme Sdn Bhd ("NSSB"). The defendant also served to provide harbour tug services for a project by Vale Malaysia Minerals Sdn Bhd ("Vale").

[50] With regard to the shareholding of the defendant, AMSB owned 80% and NSSB owned 20% of the shares of the defendant. Since AMSB was by far the majority shareholder and NSSB the minority shareholder, disputes escalated between the two groups arising primarily out of mistrust and perceived lack of transparency.

[51] Initially, the Board of Directors of the defendant ("the Board") consisted of two groups of nominees, namely the nominees of AMSB and that of NSSB. The nominees of AMSB were Dato' Seri Suresh Emmanuel Abishegam ("Dato' Suresh"), Dato' Ahmad Johari bin Tun Abdul Razak ("Dato' Johari"), Dato' Abdul Latiff bin Ahmad ("Dato' Latiff"), Hari Dass Ajaib ("Hari Dass") and Sudhir a/l Jayaram ("Sudhir"). On the other hand, the nominees of NSSB were the plaintiff and Dato' Wan Mohamed Yaacob bin Salaidin ("Dato' Wan").

[52] The Board of Directors then came to be divided into majority and minority shareholders, whereby the majority shareholders were represented by Dato' Suresh, Dato' Johari, Dato' Latiff, Hari Dass and Sudhir as the majority directors, while the minority shareholders were represented by the plaintiff and Dato' Wan as the minority directors. However, Dato' Latiff and Hari Dass had resigned from the Board of Directors effective from 30 April 2018 and 2 May 2020 respectively.

[53] The present appeals stemmed from two applications for leave to commence derivative actions on behalf of the defendant with two separate sets of facts and issues, and therefore they shall be set out separately in turn.

Appeal No: 31 – The Sinking Claim

Brief Facts

[54] On 11 April 2013, the defendant entered into a Harbour Tugs Services Agreement ("HTSA") with Vale for the charter of seven harbour tugboats owned by the defendant. Vale was also the sole customer of the defendant.

[55] The defendant entered into a Baltic and International Maritime Council (BIMCO) Standard Ship Management Agreement with Azimuth Ship Management Sdn Bhd ("ASM") for the purpose of providing the harbour tug services. The principal shareholder of ASM was Dato' Suresh who held 95% of the issued and paid-up shares. ASM was appointed as the designated ship manager to manage and operate the harbour tugs and to provide harbour tug services on behalf of the defendant for 15 years.

[56] On 19 September 2016, one of the harbour tugboats, NTT Lumut, which was managed by ASM and chartered to Vale, sank with its hull resting on the seabed while the vessel was berthed along a jetty at the Material Handling Quay of Vale's Teluk Rubiah Maritime Terminal in Perak.

[57] Following the sinking of the vessel, the Board was informed of the incident of NTT Lumut the next day by Dato' Suresh. Subsequently, on the 2 November 2016, the Chief Executive Officer of ASM, Captain Shashi Harinarayanan ("Captain Shashi") briefed the Board about the said incident relating to NTT Lumut. Captain Shashi informed the directors that the port side of the NTT Lumut was caught against the fenders at the Material Handling Quay, Teluk Rubiah Maritime Terminal. This, combined with the weather conditions and high tidal range, caused the vessel to submerge.

[58] At this same Board Meeting, Captain Shashi also reported that Vale, the Marine Department and the insurers had undertaken their respective investigations which indicated that the incident was an "accident". The plaintiff then proposed for an independent inquiry to be undertaken in respect of the incident as Dato' Suresh and AMSB were conflicted and unable to assess and investigate the incident in the best interest of the defendant. However, there was no resolution by the Board of adopting the plaintiff's proposal.

[59] On 18 November 2016, the Board was provided with a report on the incident by Vale dated 5 October 2016, with the following account:

> Brief Description:
>
> On 19th September 2016 around 1230hrs NTT Lumut that is alongside at MHQ jetty has come stuck with the fender structure at the jetty. The incident were spotted by her on crew. Attempts were made by the crews to remove her from the position but failed.
>
> Subsequently vessel was released from the position by herself due to change of tide. However entanglement between vessel and fender structure had punctured the vessel structure. This cause seawater ingress and sunk the vessel.
>
> Immediate action taken to contain any oil spillage, and emergency response were initiated to control the situation.

[60] Following from the interviews conducted with the crew of NTT Lumut as attached to the above report, the plaintiff maintained that the crew of NTT Lumut had not been given any training, manuals or briefing on any standard operating procedures in dealing with an emergency situation.

[61] At a Board meeting on 8 February 2017, the directors were informed that the Marine Department and the Department of Environment had concluded their investigations, but their reports had not been released. Again there was no decision to commission an independent investigation.

[62] At a Board meeting on 14 November 2017, Dato' Suresh informed th directors that the Marine Department had concluded its investigation and a Document of Compliance ("DOC") was issued to ASM to indicate that there was no negligence. The Board was also informed that the report of the

Marine Department was not expected to be released as the DOC was sufficient to indicate no negligence on the part of ASM. Once again, the Board resolved not to conduct an independent investigation into the incident.

[63] The plaintiff subsequently decided to engage one Mr Alan Loynd ("Loynd") of Branscombe Marine Consultant Ltd in Hong Kong to provide an expert opinion on the incident relating to the sinking of NTT Lumut. In its preliminary report, Loynd concluded:

> In conclusion, there is no evidence that any of the normal professional steps to prevent a sinking were implemented in this case. The crew do not appear to have been competent to handle the emergency, and the managers appear to have neglected normal best practice, both in training the crew and in responding to the emergency. My feeling, based upon the evidence I have seen, is that this casualty could and should have been prevented.

[64] Furthermore, in its supplementary report, in responding to a question posed by the plaintiff's solicitors, Loynd stated that the sinking could have been avoided if any of the measures noted on pp. 3 and 4 of the preliminary report had been taken.

[65] Upon advice, the plaintiff's solicitors on 11 December 2017 forwarded the questions posed by Loynd to the Board for answers as well as unrestricted access to inspect the wreckage of NTT Lumut. On 9 January 2018, at its emergency meeting, the Board were informed that the insurance proceeds received of USD8 million exceeded the value of the NTT Lumut if it were to be repaired and chartered, based on the plaintiff's valuation of USD4.1 million. After deliberations, the Board refused the requests for the answers and unrestricted access to inspect NTT Lumut.

[66] Following the Board's refusal, the plaintiff through his solicitors issued the statutory notice under s. 348 of the Companies Act 2016 ("CA 2016") dated 18 January 2018. In response, the Board in its meeting on 25 January 2018 by majority resolved to mandate the Chairman, Dato' Johari, to appoint surveyors to conduct an independent investigation into the incident involving NTT Lumut.

[67] However, the plaintiff and Syed Feisal Alhady (alternate director to Dato' Wan) voted against this proposal. The plaintiff instead proposed that two independent experts to be appointed, one by the majority directors and the other by the minority directors. The Board, however, resolved against this proposal by the plaintiff.

[68] The plaintiff maintained that this "sudden about-turn" by the majority directors in agreeing to an investigation was motivated by bad faith, with the alleged intention being to stifle his efforts to seek redress on behalf of the defendant.

The Proceedings In The Courts Below

[69] The factual matrix as set out above showed that the subject matter of the plaintiff's complaint was really the refusal by the Board to agree to the plaintiff's initial proposal for an independent investigation into the sinking of NTT Lumut. However, as it later turned out, the Board eventually agreed to appoint surveyors to conduct an independent investigation. The plaintiff's complaint was then moved to the refusal of the Board to agree to the plaintiff's new proposal which was to appoint separate independent experts by the majority and minority directors respectively.

[70] It was against this backdrop that the plaintiff commenced legal action for leave to initiate proceedings. Since no legal proceedings were going to be taken by the defendant against ASM, the plaintiff filed the application for leave to initiate proceedings against ASM in the name of the defendant under ss. 347 and 348 of the CA 2016.

[71] In opposing the application for leave to commence proceedings, the defendant argued that the plaintiff was not acting in good faith in making this application, and that the legal action against ASM would not be in the best interest of the defendant, upon grounds that such legal action would fail as the defendant had successfully claimed under its insurance policies for the loss suffered from the sinking of NTT Lumut.

[72] As a consequence, the defendant submitted that it has no right to pursue legal action for negligence against ASM for the sinking of NTT Lumut as any right of action it might have against ASM would have been subrogated to its insurers, Allianz General insurance Company (Malaysia) Berhad ("Allianz") as it had been paid a sum of USD153,002.18 under a Protection & Indemnity Policy ("PI policy") and a sum of approximately USD5.2 million under a Marine Hull Policy ("MH policy") from Allianz.

[73] It also transpired that on 14 November 2017, the Board unanimously resolved to enter into a supplementary agreement with Vale to cancel the charter of NTT Lumut for a sum of USD3.5 million. Moreover, even though the liability of ASM for any negligence was limited to ten times its annual management fee under the BIMCO Standard Ship Management Agreement, there was no annual management fee stated therein. Therefore, the defendant argued that no monetary recovery can be obtained from ASM even if it is found negligent.

[74] The defendant also contended that the Loynd reports did not conclude that ASM was actually negligent or at fault for the sinking of NTT Lumut. This could be seen in the supplementary report of Loynd where it was opined that the sinking of NTT Lumut could have been avoided "in the absence of a satisfactory answer" to the questions posed.

[75] The defendant also relied on the independent report of M3 Marine Expertise Pte Ltd ("M3 Marine") which was obtained by the Board upon the instruction of Dato' Johari. That report concluded that the document of compliance ("DOC") was issued in accordance with the International Safety Management ("ISM") Code on 20 November 2015 with a validity to 19 November 2020, which is the documentary evidence that the Safety Management System of ASM is in full compliance with the ISM Code. Furthermore, the DOC was renewed annually on 1 February 2017 after the incident, which showed that ASM had complied with the ISM Code before, during and after the incident. Based upon the report of M3 Marine, no fault on the part of ASM or the crew was suggested as the cause of the sinking of NTT Lumut or the failure to prevent such sinking.

[76] Moreover, Allianz also instructed loss adjusters Braemar Technical Services Pte Ltd ("Braemar") to carry out a survey on NTT Lumut to ascertain the cause, nature and extent of damage alleged to have been sustained. In the Braemar report dated 4 May 2017, there was nothing in it to suggest any fault on the part of ASM or the crew of NTT Lumut for the sinking of NTT Lumut. For good measure it would seem, Dato' Suresh maintained that the issue relating to NTT Lumut was part of a conspiracy against him.

[77] In dealing with the competing assertions before it, the High Court held quite rightly that in determining whether leave should be granted, the Court had to take into account two factors, namely whether the plaintiff is acting in good faith, and whether it appears *prima facie* to be in the best interest of the company to grant the leave. The court further observed that leave will not be granted if either of these factors were not established. Citing the Court of Appeal decision in *Celcom* (*supra*), the High Court also observed that leave under s. 348 of the CA 2016 is "not to be dealt with lightly and be considered with a low threshold similar to leave applications for judicial review" (at para. 115).

[78] In dealing with the first factor of good faith, the High Court held that good faith on the part of the plaintiff was not established based essentially on the following broad reasons. Firstly, there was no evidence of negligence on the part of ASM as Loynd's opinion was preliminary and not final to establish a good cause of action in negligence. As against these were the reports prepared by Vale, Braemer and M3 Marine which did not suggest any negligence on the part of ASM. Further, as investigations had not been completed, it could hardly be surmised that there was a reasonable prospect of success against ASM.

[79] Secondly, as carefully noted by the High Court Judge, various allegations had been made by the opposing factions including accusations of conspiracy against the plaintiff and evidence of committal proceedings

brought by the plaintiff against the defendant and its directors. The court observed that such disputes of apparent gravity can impair one's judgment leading to an inference of collateral purpose for the application for leave for the purpose of furthering a dispute or creating controversy or disrupting an opposing party's management of the company.

[80] With regard to the second factor of *prima facie* in the best interest of the defendant, the court held that it would not be in the best interest of the defendant to initiate an action which is not supported by any evidence showing the existence of a reasonable cause of action and a reasonable prospect of success. The court further held, in summary, that no consideration appears to have been given as to the cost of the legal action, and even if there is a reasonable cause of action, it has not been demonstrated whether such legal action would be worthwhile when the defendant was indemnified by Allianz and entered into the close-out supplementary agreement with Vale.

[81] Further, in the event that legal action is pursued, it may jeopardise Vale's relationship with the defendant as it may not be Vale's preference to do business with a company having internal disputes to the extent of legal action and Vale's personnel being required to testify in the court. There was also no evidence that the defendant was under any financial pressure to warrant it embarking on a legal action particularly when such legal action is without a concluded view as to any negligence and would only exacerbate and compound the differences between the main shareholders of the defendant.

[82] Accordingly, the High Court held that the plaintiff was premature in seeking leave under s. 348 of the CA 2016 when he did not propose to the Board for commencing legal action against ASM, and did not secure evidence supporting a good cause of action, as the Board is *prima facie* in the best position to determine what is in the best interest of the defendant. If the objective of the application for leave was to compel the defendant to facilitate Loynd's investigation, then ss. 347 and 348 of the CA 2016 cannot be used to serve this purpose as the purpose under s. 347 of the CA 2016 must be to initiate, intervene in or defend a proceeding on behalf of the company.

[83] On appeal, the Court of Appeal dismissed the appeal brought by the plaintiff and affirmed the decision of the High Court in refusing to grant leave to initiate derivative action. Broadly, the court held that the plaintiff had not made out a good cause of action and a reasonable prospect of success such that the requirement of good faith had not been established.

[84] The court further agreed with the High Court that it was not *prima facie* in the best interest of the defendant when there is no financial loss to the defendant when it was found that the net income from the insurance proceeds

and compensation from Vale is higher than if compared to the vessel's continuing operations, and there could be genuine commercial considerations in not pursuing a claim so as not to damage a good long-term profitable relationship with Vale, which is the defendant's sole customer.

Our Analysis And Decision

[85] Bearing in mind the applicable law and principles in relation to the application for leave under ss. 347 and 348 of the CA 2016 as discussed earlier, we considered that the decision made by the courts below should be affirmed for the reasons that follow.

[86] With regard to the leave requirement of good faith, we reiterate that the plaintiff is required to demonstrate that he has an honest belief that a good cause of action exists and has a reasonable prospect of success, which is a subjective component. However, the plaintiff may be disbelieved if no reasonable person in the circumstances could hold that belief, which is an objective component.

[87] On the facts of the case, it is difficult to accept that the plaintiff had such an honest belief when Loynd's opinion was not final and conclusive such as to provide a good cause of action and show a reasonable prospect of success against ASM as Loynd had not completed its investigation. In this respect, we agree with the findings by the High Court as follows:

> [125] On his part, what the Plaintiff has are Loynd's preliminary and supplementary reports. In his preliminary report, Loynd himself stated of the documents given for his consideration that, in my opinion these documents are totally inadequate since they do not explain the cause and location of damage or the exact course of events which led to the loss of the vessel.
>
> [126] Loynd then goes on to state in his own words, that "At the moment, **I do not have sufficient evidence to fully explain** the loss of NTT Lumut, but a number of questions should be address, as follows ..."
>
> [127] However, and curiously, notwithstanding his foregoing statements, Loynd nevertheless concluded in his preliminary report that, "My feeling based upon the evidence I have seen, is that this casualty could and should have been prevented."
>
> [128] In his supplementary report Loynd gave what was in essence a conditional answer to the question posed by the solicitors for the Plaintiff. Read together with the question posed to him, Loynd's opinion was that, "in the absence of a satisfactory answer to the questions" he posed in his preliminary report, he believes that the sinking of NTT Lumut could have been avoided and he proceeded to give reasons therefor.
>
> [129] No answers were however given to the questions Loynd posed. Therefore, whether the answers would satisfy Loynd or not does not arise. This also means that what Loynd's final opinion may, remains at large,

[130] M3 Marine's report was subsequently disclosed to Loynd. Loynd was instructed to and he provided his views as to why he thought certain of the findings and observations were not sustainable. However, it must be borne in mind that the base material for Loynd's conclusion were still only those given to him for his preliminary report, without his having the benefit of a full investigation of his own.

[131] In fact, among the various orders sought by the Plaintiff in its originating Summons (Enclosure 1), were, if leave be granted:

> (d) an order that the Defendant give Mr. Alan Loyna, a marine, specialist and/or his servants or agents unrestricted access to inspect the wreckage of NTT Lumut to enable him to complete his investigation and to deliver his final report on the sinking of NTT Lumut;
>
> (e) an order that the Defendant furnish all necessary information and render all necessary assistance required by Mr. Alan Loynd and/or his servants or agents to enable him to complete his investigation and deliver his final report on the sinking of NTT Lumut;

Clearly therefore, Loynd's opinion was not final and until it is, it cannot be said that it was his opinion a good cause of action in negligence exists against Azimuth Ship Management and one that has a reasonable prospect of success.

[132] Against Loynd's reports, and what are essentially his preliminary views, were Vale's report, Braemar's report and M3 Marine's report. These reports did not suggest that there was any negligence on the part of Azimuth Ship Management. Whatever may be the criticisms levelled against these reports, they cannot nevertheless be said to be supportive of any conclusion that a good cause of action exists against Azimuth Ship Management and one with a reasonable prospect of success.

(emphasis added)

[88] For the reasons stated in the foregoing, we are of the view that the plaintiff could not have an honest belief that a good cause of action exists and had a reasonable prospect of success. Quite simply, the Loynd report which the plaintiff has placed great reliance is incomplete and inconclusive and cannot therefore provide the basis of such honest belief. Loynd did not have sufficient evidence to fully explain the incident and it is merely his "feeling" that the incident could have been avoided.

[89] Still on the subject of good faith, we had also accepted at the outset that an applicant is also required to ensure that the application for leave is not brought up for a collateral purpose. There is no good faith if the applicant possesses collateral purpose which amounts to an abuse of process unless the applicant proves that it is sufficiently consistent with the purpose of doing justice to a company. If it can be shown that an applicant is pursuing an

ulterior purpose unrelated to the subject matter of the derivative action and that, but for his ulterior purpose, he would not have commenced such proceedings at all, that is an abuse of process.

[90] Now, the Court of Appeal found that there was an ulterior motive on the part of the plaintiff following the events of the marine incident involving NTT Lumut. The finding was in the following terms:

> [65] Secondly, reference must to be made the events which unfolded after the incident. Capt. Suresh informed the Board a day after the incident by email dated 20-9-2016. We find it most telling that the Appellant's 1st response, 9 days after the incident, was to send an email dated 28-9-2016 (enclosure 79/120-121) to the Chairman that Capt. Suresh and ASM ought to be held personally liable. At the Board meeting on 2-11-2016, the Appellant called for an independent investigation due to the conflict situation. Hari Das, the then director, expressed that there were adequate investigations being carried on. The Appellant informed he may consider a section 181 action.
>
> [66] Other meetings would show the Board had resolved to defer the issue pending availability of reports and investigation from the Marine Department, the insurers had paid out RM 20 million and the DOC had been issued. After Loynd's report, the Board had on 9-1-2018 resolved not to accede to the independent investigation where Hari Das stated the financial proceeds exceeded the vessel's value and the Appellant responding to not look only at the monetary perspective (minutes of EGM, enclosure 76/312).
>
> [67] After the statutory notice under section 348(2) CA 2016 was issued, the Board on 23-1-2018 resolved to have an independent investigation and the mandate given to the Chair. This was opposed by the Appellant and Wan who wanted 2 experts to be appointed, 1 by the Majority Directors and 1 by the Minority (minutes of EGM, enclosure 76/319). The Board's independent investigation was subsequently conducted by M3 Marine. This must have been the context under which the HCJ said no independent investigation satisfies the Appellant.
>
> [68] The events as outlined above show the ulterior motive of the Appellant in continually demanding an independent investigation and when finally acceded to by the Board, rejecting it and instead asking for 2 experts to be appointed, at the Respondent's cost.

[91] In this regard, we do not agree with the Court of Appeal that there existed some collateral purpose on the part of the plaintiff. Disagreements between directors of opposing factions in a company are not uncommon and are not by themselves indicative of some collateral purpose or bad faith. There must be more than just disagreements. Even if there has been ongoing litigation among themselves, that on its own without more is not determinative of an ulterior motive. The primary consideration here is whether the motive or purpose is to bring justice to the company and for its benefit even if it at the same time benefits the applicant.

[92] In our assessment, it was reasonable for the plaintiff to seek for an independent investigation into the sinking of NTT Lumut even if the process by which such an investigation is to be carried out was disputed by the parties. Nothing sinister could be attributed to the plaintiff in insisting for an independent investigation as Dato' Suresh, being the owner of ASM, was in a position of conflict. In the end, although quite late, the Majority Directors acceded to an independent investigation although not in the manner proposed by the plaintiff. This should have been the end of the matter as the Board had now acted in the best interests of the defendant. Nevertheless, even if the argument on collateral purpose fails, it is plain that the plaintiff had failed to establish good faith.

[93] Moving now to the requirement of *prima facie* in the best interest of the company, both the High Court and the Court of Appeal were of the view that it does not appear *prima facie* to be in the best interest of the defendant that leave be granted upon the basis that the defendant has genuine commercial considerations not to pursue the action. The factual matrix which provides the grounds for such genuine commercial considerations is sufficiently dealt with by the courts below as follows.

[94] In the High Court, it was observed:

> [152] No consideration appears to have been given as to how much the proposed action by the defendant would cost in terms of professional fees including the cost of an expert's opinion and fee for attendance in court as a witness, not to mention the cost of an appeal against the decision of the court at first instance that may follow. It has not been demonstrated that from a cost benefit perspective, even if there exists a reasonable cause of action, whether such an action would be worthwhile for the defendant to pursue, bearing in mind the insurance monies received and the close-out supplementary agreement with Vale in respect of NTT Lumut. The proposed action, even if successful, may be a Pyrrhic victory for the defendant.
>
> [153] Vale, by reason of the HTSA, is a significant client of the defendant. If the proposed suit against Azimuth Ship Management were to be pursued, Vale may well be required to provide evidence. Its report on the incident being relatively contemporaneous would no doubt be relevant and the plaintiff would probably seek to rely on it, bearing in mind Loynd having done so for his reports.
>
> [154] However, Vale has expressed its views on the matter. In its letter to the defendant of 13 February 2018, Vale stated as follows:
>
> 1. ...
> 2. We note your request for Vale's permission to disclose Vale's reports and documents to an independent surveyor for the purpose of investigating the September 2016 incident involving the NTT Lumut. At this time, I regret to inform you that Vale cannot accede to your request.

4. Vale considers this incident to have been brought to an end and we reached agreement regarding the removal of the NTT Lumut from the Harbour Tugs Services Agreement 11 April 2013 ('HTSA'). This resolution and the fact that it has been more than a year since the incident should bring this matter to a close. If that is not the case, Vale would ask to be informed of the matter being pursued and why we are now being asked to consent to third party disclosures.

5. We are aware of a number of disputes involving shareholders and/or officers of NTT. We wish to stress that Vale makes no comment on the merits of any parties' case and would wish to be impartial in any dispute. We do not wish to be drawn into those matters.

6. We take this opportunity also to remind NTT of its obligations under the HTSA, in particular clause 26 and the obligation on NTT to safeguard confidentiality. If any confidential information has been disclosed without our consent to any third parties in circumstances not permitted by the HTSA, we request NTT to confirm that such information will not be used or further disclosed and will be returned or destroyed. We request NTT seek similar undertakings from any third parties in receipt of confidential information other than as permitted by the HTSA. We reserve our rights in this regard.

7. I hope my explanation above clarifies Vale's stand.

Yours faithfully

For VALE MALAYSIA MINERALS SDN BHD (863428-M)

-Sgd-

Tim Jackson
Head of Legal & Compliance,
Asia Pacific & Middle East. (emphasis added)

[155] This letter was to the defendant marked to the attention of Captain Suresh as its chief executive officer. The plaintiff however, in his capacity as a director of the defendant, wrote a letter dated 20 March 2018 in response to vale's letter. The plaintiff expressed regret for the inconvenience caused to Vale and proceeded to provide Vale with an explanation of the issues the plaintiff saw as relevant with reference to his attempts to secure an independent investigation, the need to disclose Vale's report in this proceeding and the defendant's shareholders' dispute. This letter of the plaintiff drew no reply from vale.

[156] Bearing in mind the foregoing, if the proposed legal action is brought this may well jeopardise Vale's relationship with the defendant. Objectively, it is not likely to be Vale's preference to have to do business with a company that is steep in internal disputes to the extent of there being legal actions filed and Vale's personnel being required to testify. If the proposed action is brought against Azimuth Ship Management, it is difficult to see how Vale can be kept from getting involved.

[95] In a similar vein, the Court of Appeal observed: A

> [90] We noted earlier a ground for leave was the sinking had a substantial financial impact on the Respondent. However, the Respondent was paid USD5.2 million from the MH Policy, USD153,002.18 under the PI Policy and a close out compensation sum of USD3.5 million from Vale (enclosure 76/260-262). This is to be contrasted with the Appellant's value B of the vessel of USD4.1 million (FHMH report dated 24-10-2017). This value was on NTT Larut which has the same specification as the sank vessel, NTT Lumut. There was also a Parker Randall report dated 18-6-2018 (enclosure 77/100) where at page 122 it was concluded the net income from the insurance proceeds and compensation from Vale is higher than if compared to the vessel's continuing operations. It was C noted the Appellant's FHMH report did not suggest the conclusions in the Parker Randall Report was wrong. This meant there was no financial loss to the Respondent which would mean it was not *prima facie* in the interest of the Respondent for derivative action to proceed.
>
> [91] Being cognisant that the Court must weigh all circumstances and D decide whether a claim ought to be pursued as per Pang Yong Hock, we also considered there could be genuine commercial considerations in not pursuing a claim such as in not wanting to damage a good long term profitable relationship. This brings us to Vale, the Respondents sole customer and the reason why the Respondent was established as a joint venture. Given this context, we find that the HCJ was correct to say that E the Respondent's relationship with Vale would be affected if there was a claim made against ASM. The letter dated 13-2-2018 from Vale to the Respondent is most relevant where Vale had considered the incident to be closed with the close out agreement (paragraph 4). Paragraph 5 then went on to say:
>
> F
> > We are aware of a number of disputes involving shareholders and/ or officers of NTT. We wish to stress that Vale makes no comment on the merits of any parties' case and would wish to be impartial in any dispute. We do not wish to be drawn into those matters.
>
> [92] A concern was expressed in paragraph 6 of the need to safeguard G confidentiality.
>
> [93] The Appellant submitted his response to Vale dated 20-3-2018 (enclosure 77/63-66) had not been considered by the HCJ and the fact that Vale did not reply meant Vale accepted the Appellant's explanation. At best, this is speculative in the light of the strong and clear concerns expressed by Vale in its letter dated 13-2-2018. H
>
> [94] The other commercial decision would be the potential legal costs to be incurred. This would include the costs of experts and appeal from the High Court. This has surely to be weighed against what the Respondent has received from the insurance and Vale and what the Appellant says is the loss of at least USD1.2 million. I

A [95] Weighing the cost, risk and distraction caused by the intended litigation, we cannot say if this is *prima facie* in the best interest of the Respondent, especially when its sole customer, Vale, had considered the matter closed. This could well be an instance where the end does not justify the means.

B **[96]** Despite the forceful submissions by learned counsel for the plaintiff, we were not persuaded that the courts below were in error when holding that it does not appear *prima facie* to be in the best interest of the defendant that leave be granted.

[97] We were of the view that considering the evidence in its entirety as C the courts below had done, there were genuine commercial considerations for the defendant not to pursue the action. It was significant that Vale, being the sole customer of the defendant, did not wish to be drawn into the dispute. Vale had preferred to make no comment on the merits of any parties' case and remain impartial. It would therefore appear that if legal action is D initiated, it would drag Vale into the conflict. This may jeopardise the relationship between the defendant and Vale, and it certainly would not be in the best interest of the defendant for leave to be granted.

[98] Furthermore, the defendant had also been paid a sum of USD153,002.18 under PI policy and approximately USD5.2 million under E MH policy from Allianz. The Board had also unanimously resolved to enter into a supplementary agreement with Vale to cancel the charter of NTT Lumut for a sum of USD3.5 million to be paid by Vale to the defendant. There is also the report by Messrs Parker Randall which concluded that the net income from the insurance proceeds and compensation from Vale is F higher than if compared to the vessel's continuing operations. Thus, objectively speaking, even if legal action is successful, it may turn out to be a pyrrhic victory for the defendant.

[99] In the circumstances, the defendant could be said to have genuine commercial considerations for not wanting to pursue claims as it did not wish G to damage a good, long-term and profitable relationship with Vale. Not only that, when the Board had made what appeared to be a *bona fide* commercial decision that it is not in the interests of the company to commence the proceedings, the courts should be slow to intervene. For all these reasons, the contention by the plaintiff that any finding that the Vale's relationship H will be affected is unsupported by evidence and wholly speculative is without merit.

[100] In conclusion, following from the discussion aforementioned, the plaintiff cannot be said to be acting in good faith and it does not appear *prima facie* to be in the best interest of the defendant that leave be granted. I Accordingly, this appeal was dismissed with costs.

Appeal No: 32 – Shareholders' Advance Claim

Brief Facts

[101] Further to the material facts as set out earlier, pertinent facts relating to this appeal can be restated as follows. On 12 April 2013, the defendant entered into a sale and purchase agreement ("SPA") with Shin Yang Shipyard Sdn Bhd ("SYS") where SYS agreed to build, sell and deliver seven tugboats to the defendant as required by Vale for the total amount of USD68.5 million ("total purchase price").

[102] To recap, the defendant was involved in a project in Lumut consisting of the hire and charter of the tugboats to Vale, a subsidiary of a foreign company, in a 15-year contract that promises to gross some USD220 million in revenue. The defendant was owned by Azimuth Marine Sdn Bhd ("AMSB") holding 80% of the shares and Nautilus Supreme Sdn Bhd ("NSSB") holding 20% of the shares.

[103] A facility agreement was entered into between the defendant and Export-Import Bank of Malaysia Berhad ("Exim Bank") for the finance of 70% of the total purchase price of the tugboats. The shareholders agreed that the balance of 30% of the total purchase price ("balance purchase price") amounting to USD20,550,000 would be financed by way of shareholders' advance of the defendant ("shareholders' advance") which would be treated as debt due from the defendant to the shareholder, and the defendant would pay interest at the rate of 7% on the shareholders' advance ("shareholders' interest") to be paid to its two shareholders, namely AMSB and NSSB, based upon the amount they paid.

[104] On 16 December 2012, Dato' Suresh furnished to the plaintiff a breakdown of the shareholders' advance known as the equity payment schedule, which demonstrated that the defendant only required from the shareholders a sum of USD12,370,000 whereby the portion of NSSB was USD1,864,176 to be paid in five instalments and the balance was to be paid by AMSB.

[105] However, sometime in early 2015, Dato' Suresh negotiated a reduction in the final amount payable to SYS. As such, NSSB was not required to pay the fifth instalment, and only paid four instalments of RM4,998,882.52 (approximately USD1,550,003) after deduction of "brokerage fees" amounting to USD8.18 million.

[106] With the shareholder advances and the Exim Bank facility, the purchase price would have been paid on delivery of each tugboat. As it turned out, the last tugboat was delivered to the defendant in June 2015. By August 2015, the tugboats were all operational and it appeared to be smooth sailing for the defendant in generating revenue.

[107] However, in August 2015, the plaintiff was alerted to some discrepancies with regard to the payment of the balance purchase price to SYS upon receiving a letter from SYS to the defendant claiming for payments owed from the defendant of a sum of USD21,439,421.72. This meant that only USD47,060,578.28 out of the total purchase price was paid to SYS, and it is less than the sum of USD47,950,000 financed by EXIM Bank.

[108] At this point of time, the plaintiff and Dato' Wan, the two directors of NSSB, were not aware of the actual sum that AMSB had paid for their portion of the shareholders' advance to the defendant, and the plaintiff was merely informed by Dato' Suresh that AMSB had been contributing their portion. They had therefore assumed in good faith that AMSB had complied with the equity payment schedule and paid their portion.

[109] It was then discovered that a sum of over RM90 million (equivalent to about USD19.9 million) had been captured in the audited accounts of the defendant as shareholders' advance. However, when the Minority Directors pressed for an answer from the defendant, they were rebuffed.

[110] Not surprisingly, the plaintiff persisted with numerous requests for clarifications and accounting records from the Board of Directors. However, the plaintiff claimed that the Board did not provide adequate explanation. Furthermore, the plaintiff's request as director for access to the defendant's books and records was also denied by the Majority Directors and management.

[111] As a consequence, the plaintiff commenced legal action by filing originating summons of No.: WA-24NCC-179-04-2016 for an order that accounting and other records of the defendant be opened for inspection, and the High Court accordingly, on 16 January 2017, allowed the application ("inspection order").

[112] Pursuant to the inspection order, Messrs Crowe Horwath ("Crowe Horwath") were appointed as the auditor to carry out the inspection. Based on their inspection, Crowe Horwath then prepared three reports; the preliminary report dated 15 February 2017; the supplementary report dated 16 April 2018 and a follow-up report on 14 August 2018 ("Crowe Horwath Reports"). These three reports significantly demonstrated that there was a lack of any independent and credible evidence to substantiate payment of approximately USD19.9 million recorded in the defendant's books as the shareholders' advance by AMSB.

[113] Learned counsel for the plaintiff also contended that the complete accounting records of the defendant were not made available to Crowe Horwath despite the inspection order. The plaintiff's solicitors had repeatedly written to the defendant's solicitors for copies of the accounting records and supporting documents to evidence the portion of payment of the shareholders' advance by AMSB as recorded in the defendant's books.

[114] By letter dated 20 April 2018, the plaintiff's solicitors, in questioning the management of the Tug Boats Project between the defendant and SYS, also forwarded the Crowe Horwath Reports to the Board of Directors with the following questions:

(a) Why the sum of USD 19.9 million recorded in journal entries in the general ledger of the Company [the Defendant] as purportedly paid by AMSB directly to Shin Yang [SYS] is not supported by any documents?

(b) Why only a sum of USD 647,390 was paid by the Company [the Defendant] to Shin Yang [SYS], although NS SB had paid a sum of USD 1.55 million (approximately RM4,998,882.52) to the Company [the Defendant] for remittance to Shin Yang [SYS]?

[115] However, no explanation was offered by the Board. Instead, the Board claimed that there were letters from SYS purporting to acknowledge receipt of the balance purchase price to conclusively prove that the balance purchase price had been fully paid. Moreover, the Board also stated that the audited accounts of the defendant had been certified and approved by the defendant's auditors, and NSSB had accepted the shareholders' interest without objection.

[116] Consequently, due to the refusal of the Board to provide answers to the questions posed and to furnish the relevant evidence, the plaintiff issued a statutory notice to the Board of his intention to seek leave to initiate derivative action under s. 348 of the CA 2016 on behalf of the defendant,

[117] When the defendant failed to respond to the statutory notice, the plaintiff proceeded in August 2016 to apply to the High Court for leave to commence a derivative action on behalf of the defendant under s. 348 of the CA 2016 to hold the putative defendants jointly and severally liable and accountable for the shareholder interest of RM14,619,166.47 paid out by the defendant to AMSB and NSSB premised upon the shareholders' advance which was not properly substantiated by any documents. The plaintiff named six putative defendants. The first to fifth putative defendants are the directors nominated by the majority shareholder, namely Dato' Suresh, Dato' Johari, Dato' Latiff, Hari Dass and Sudhir. Whereas, the sixth putative defendant is Azian binti Abdul Aziz ("Azian"), the Financial Controller of the defendant.

Proceedings In The Courts Below

[118] The High Court however decided that the plaintiff had failed to satisfy the pre-requisites under s. 348 of the CA 2016 to obtain leave to commence a derivative action on behalf of the defendant, upon the following broad grounds. Firstly, the plaintiff could not be said to be acting in good faith under s. 348(4) of the CA 2016 as the plaintiff failed to establish an arguable case, where the Crowe Horwath Reports did not arrive at a conclusive or

final determination of any identifiable breach of procedure or wrongdoing on the part of the defendant, and that SYS had acknowledged the receipt of full payment.

[119] It was further held that the legal action commenced by the plaintiff came with a collateral purpose of intending to disrupt and destabilise the operations of the defendant as the plaintiff raised his complaints three years after the final payment to SYS was made. The plaintiff first had the opportunity to do so in 2015. The High Court held that this brings into scrutiny the purpose for the plaintiff in bringing this action only at the time when the shareholders are at odds with each other. As such, at the very minimum, the action brought by the plaintiff had the collateral purpose of intending to disrupt and destabilise the operations of the defendant.

[120] Secondly, the court held that the derivative action by the plaintiff was not in the best interest of the defendant under s. 348(4) of the CA 2016 as it would be disruptive for the defendant to be subjected to an extensive forensic audit sought by the plaintiff (if leave is granted) when no clear basis for such requirement was established. Moreover, a restatement of accounts sought by the plaintiff was a major exercise for any company, and therefore it is not in the best interest of the defendant when it is clear that the defendant's yearly financial statements from 2013 to 2018 have been duly audited and approved by three separate audit firms without qualification.

[121] On appeal, the Court of Appeal, however, ruled that the plaintiff had satisfied the threshold for good faith and the best interest of the defendant for the granting of leave to commence derivative action. The following broad reasons were advanced for allowing the appeal.

[122] Firstly, the Court of Appeal held that the High Court erred in requiring Crowe Horwath to have made a determinative finding of wrongdoing on the part of the defendant as that is for the plaintiff to establish at the trial on a balance of probabilities. At this stage, the plaintiff is merely required to show a reasonable prospect of success.

[123] Secondly, the High Court should not have regard to the plaintiff's prayer for a forensic report to be prepared as this prayer had been abandoned, and that the High Court should also not have regard to the plaintiff's prayer pertaining to the appointment of a forensic accountant as it was also withdrawn.

[124] Thirdly, the High Court did not appreciate that in permitting the defendant to pay out the shareholders' interest of RM11,815,625.64 and RM3,147,162.65 to AMSB and NSSB respectively based on a wholly unverified debt, the Majority Directors and management have not only potentially caused the company (the defendant) substantial loss, but also exposed the company (the defendant) to a risk of further substantial loss.

[125] Fourthly, the High Court also failed to appreciate the *prima facie* culpability and wrongdoing of the Majority Directors and the management of the defendant as failure of the directors to keep proper accounting records to substantiate especially material transactions would expose them to a breach of statutory and fiduciary duties.

[126] Fifthly, the Court of Appeal also observed that it was "disturbing" that payments on behalf of the defendant by AMSB to Shin Yang amounting to USD19.9 million were only evidenced by journal entries in the defendant's general ledger without independent supporting documents, and there were no documents to show that the defendant agreed to allow AMSB to make direct payments to SYS on its behalf.

[127] Sixthly, the plaintiff was asking for a proper accounting of the actual amount claimed to be paid out by the defendant to SYS, and the plaintiff is not estopped from calling SYS to explain the manner the balance purchase price was paid even though SYS had acknowledged receipt of the same. The plaintiff could only verify that only USD647,390 was forwarded by the defendant to SYS out of the USD1.55 million paid by NSSB to the defendant for remittance to SYS.

Our Analysis And Decision

[128] Bearing in mind the applicable law and principles in relation to the application for leave under ss. 347 and 348 of the CA 2016 as discussed earlier, we considered that that the decision made by the Court of Appeal should be affirmed for the reasons that follow.

[129] With regard to the leave requirement of good faith, we reiterate that the plaintiff is required to demonstrate that he has an honest belief that a good cause of action exists and has a reasonable prospect of success, which is a subjective component. However, the plaintiff may be disbelieved if no reasonable person in the circumstances could hold that belief, which is an objective component.

[130] As we had observed, the court is not supposed to delve into the merits of the substantial issues of the case in an application for leave of the court to commence derivative action under ss. 347 and 348 of the CA 2016, much less turn it into a mini trial. With respect, we agree with the Court of Appeal that the High Court had erred in deciding that the plaintiff was not acting in good faith as he failed to establish an arguable case on the ground that the Crowe Horwath Reports did not arrive at a conclusive or final determination of any identifiable breach of procedure or wrongdoing on the part of the defendant.

[131] Upon considering the material facts and the legal principles as discussed above, it is plain that the plaintiff had satisfied the element of "good faith" in respect of the subjective component of the honest belief that

A a good cause of action exists and has a reasonable prospect of success, as well as the objective component of honest belief that a reasonable person in the circumstances could hold that belief. And we say so for the following reasons.

B **[132]** What stands out, firstly, is that there are no documents to prove the amount which AMSB is alleged to have paid as shareholders' advance. Moreover, there are no documents to prove that the defendant had agreed to allow AMSB to make direct payments to SYS on its behalf. We also noted that the preliminary report issued by Crowe Horwath pointed to the unavailability of records and documents in relation to the shareholders' C advance, the Supplementary Report of Crowe Horwath also reaffirmed the findings in the preliminary report and states that "unavailability or non-keeping of the above-mentioned records and documents raises grave concern over the manner in which the management maintain their accounting records".

D **[133]** The follow-up report of Crowe Horwath was more damning in that it concluded that "the veracity of the financial statements is called into question" since the amount of USD19.9 million as the shareholders' advance from AMSB is totally unsubstantiated by proper payment documentation. Also of importance is the fact that the letters from SYS acknowledging the E receipt of payments do not provide the identity or even a single detail of the payer of the purported amount referred to in each of the letters, particularly whether the payer was the defendant, AMSB or other third party.

[134] Moving on to the second part of the element of "good faith", we were unable to see how the application was brought up for a collateral purpose as F found by the High Court. With respect, the High Court was in error in holding that the plaintiff came with a collateral purpose of "intending to disrupt and destabilise the operations of the defendant" as the plaintiff raised his complaints three years after the final payment to SYS was made when he had the opportunity to do so in 2015.

G **[135]** In this regard, despite the forceful arguments by learned counsel for the defendant, we were more persuaded by the findings by the Court of Appeal together with the reasons given as follows:

> [152] This is apart from the fact that the parties have developed a measure H of animus and angst against each other. We agree with the plaintiff that the existence of hostility or disputes between shareholders, or even questionable motivations are by themselves insufficient to show lack of good faith. After all, when JV parties sue each other in Court, we cannot expect them to be cordial to each other and as expected, accusations are often met with counter-accusations. Some fireworks are expected and I perhaps through the crucible the impurities would percolate to the surface, leaving the refined gold behind.

> [153] The refined gold is the mission or purpose of the derivative action, shorn of the personalities that may have commenced the action; a case of separating the actors from the actions, the personalities from the problem. We need to ask if Timor's judgment is so clouded and coloured by purely personal considerations designed for personal profit in bringing the proposed derivative action that is inconsistent with the interest of the Company as a whole and even damaging to the Company's interest?
>
> [154] We are not unaware that there are instances where the venom of a personal vendetta is both vexatious and vituperative such that it contaminates and corrupts all actions taken, where the personal agenda would take centre stage and that anything remotely for the best interest of the company is only peripheral as in a pass over. We see nothing of a knee-jerk reaction from Timor and the actions taken are not that of revengeful retribution but reasoned and reasonable. It cannot be said that Timor in speaking for the Minority Shareholders have distorted the dispute beyond all proportion of decency or that it is designed to distract and destroy the Company.

[136] As we had mentioned earlier, in assessing the element of "good faith" under s. 348(4) of the CA 2016, we must look to the motivations of an applicant in order to determine whether he is acting in good faith. Was it a case where the applicant was influenced by purely personal considerations or that he was so motivated by vendetta, perceived or real, that his judgment became clouded by his own personal considerations rather than that of the company? If so, he could not be said to be acting in good faith.

[137] However, as observed earlier, hostility alone is insufficient as the opposing parties are most likely to be unhappy and distrusting of each other when they see that something is not right or if they perceive to have been unjustly treated. In the present case, as correctly found by the Court of Appeal, the actions of the plaintiff could not by any stretch be that of vengeful retribution but were in the end reasoned and reasonable. Thus, it can hardly be said, as the High Court had unfortunately found, that the plaintiff has distorted the dispute and that his motivation was designed to distract and destroy the defendant. The plaintiff was perfectly entitled to seek answers as to how the payments to SYS were made. When all he got in response was that SYS had confirmed receiving full payment without providing any documents as to how SYS was paid, anyone in the plaintiff's shoes would have insisted on answers.

[138] Now, any person with an imaginative mind can conjure up all kinds of possibilities for the state of affairs of the defendant. In our view, this remains the function of the court hearing the derivative action. It is for the trial court, after considering all the oral and documentary evidence, to determine these issues. Our role at the leave stage is only to perform a kind of filtering process so that only genuine cases are permitted.

[139] For the said reasons, we agreed that the element of "good faith" was made out after establishing the subjective and objective components of honest belief coupled with the absence of any collateral purpose.

[140] Dealing now with the element of "best interest of the company", it could hardly be disputed that the defendant was saddled with a wholly unverified and unsubstantiated debt in excess of RM90 million with the result that millions of ringgit in shareholders' interest is continuing to be paid out by the defendant. The defendant would therefore gain substantially in money terms of being relieved of the debt through the proposed derivative action in the event that such derivative action was successful. If the action is successful, the defendant would also stand to recover the shareholders' interest already paid by the defendant to NSSB and AMSB. The interest comes to RM14,619,166.47 and that is certainly not an insubstantial amount.

[141] Furthermore, it is unlikely that the proposed derivative action would distract the defendant from its focus on the lucrative business with Vale as the parties are fully aware of the facts of the case as could be seen in the case of *Nautilus Tug & Towage Sdn Bhd v. Nautical Supreme Sdn Bhd & Ors* [2022] 4 CLJ 594. The opposing parties have filed voluminous documents in various suits and actions in the courts against each other. The level of attrition, suspicion and aggravation is already there. In the present case, what is required is essentially documents to substantiate the shareholder advances which would not be a complicated matter in our estimation.

[142] Now, the defendant argued that the Court of Appeal failed to consider whether there was an alternative remedy available to settle the shareholders' disputes without dragging the defendant into litigation. In particular, the defendant's argued that the dispute is in fact between the shareholders, and therefore it is not in the best interest of the defendant to commence the derivative action; instead, it was argued that it should have been ventilated and resolved by other means.

[143] With respect, the defendant's argument was untenable as the availability of alternative remedies does not serve as a bar to the granting of leave to commence derivative action. In fact, there is nothing to prevent the institution of a derivative action concurrently with that of an alternative remedy, in our view, the availability of alternative remedies merely serves as a factor which the court may consider in relation to the element of "best interest of the company". It is not necessarily the case that leave would be refused if an alternative remedy is available to redress the disputes.

[144] The argument of an alternative remedy carries less force in the present case as the inspection order obtained by the plaintiff failed to yield concrete results. Despite the inspection order, the complete accounting records of the defendants were not made available to Crowe Horwath. The plaintiff's

solicitors had to repeatedly write to the defendant's solicitors for copies of the accounting records and supporting documents to evidence the portion of payment of the shareholders' advance by AMSB as recorded in the defendant's books.

[145] Next, it was also argued that the plaintiff was a direct and knowing participant of the alleged wrongdoing as a result of which he received some benefits of which he now complains. Relying on the principles constructed in the cases of *Nurcomhe v. Nurcombe and another* [1985] 1 All ER 65 ("*Nurcombe*"), *Towers v. African Tug Company* [1904] 1 Ch 558 ("*Towers*") and *Swansson* (*supra*) in relation to how the elements of "good faith" and the "best interest of the company" ought to be assessed, it was submitted that the plaintiff was precluded from obtaining leave to commence derivative action as he was a direct and knowing participant of the alleged wrongdoing and has also received a benefit.

[146] These arguments appear in the written submissions of the defendant. Dealing first with the case of *Nurcombe*, the relevant passages referred to by the defendant in their submission are reproduced as follows:

> ... It follows that the court has to satisfy itself that the person coming forward is a proper person to do so. In *Gower's Principles of Modern Company Law* (4th edn, 1979) p 652 the law is stated, in my opinion correctly, in these terms:
>
> > The right to bring a derivative action is afforded the individual member as a matter of grace. Hence the conduct of a shareholder may be regarded by a court of equity as disqualifying him from appearing as plaintiff on the company's behalf. This will be the case, for example, if he participated in the wrong of which he complains.
>
> ...
>
> A particular plaintiff may not be a proper person because his conduct is tainted in some way which under the rules of equity may bar relief. He may not have come with 'clean hands' or he may have been guilty of delay.

[147] Secondly, in the case of *Towers*, the relevant passages referred to by the defendant in their submission appear as follows:

> ... I think that an action cannot be brought by an individual shareholder complaining of an act which is *ultra vires* if he himself has in his pocket at the time he brings the action some of the proceeds of that very *ultra vires* act. Nor, in my opinion, does it alter matters that he represents himself as suing on behalf of himself and others. I think that the reason which requires us to say he ought not to bring such an action equally requires us to say that he ought not to be the peg upon which such an action is to be hung for the benefit of others.

[148] And thirdly, in the case of *Swansson*, the defendant relied on the passages as follows:

> [43] Further, if an applicant for leave under s. 237 seeks by the derivative action to receive a benefit which, in good conscience, he or she should not receive, then the application will not be made in good faith even though the company itself stands to benefit if the derivative action is successful. Such a benefit would Include, for example, a double recovery by the applicant for a wrong suffered or recompense for a wrongful act inflicted upon the company in which the applicant was a direct and knowing participant with the proposed defendant in the derivative action. In such a case the law would not permit the applicant to derive a benefit from his or her own wrongdoing.

[149] In this context, by referring to the above passages and the factual matrix of the instant case, the defendant appears to suggest that the plaintiff may not be a proper person to bring forth the derivative action as his conduct is tainted. In other words, he has not come with "clean hands" and should be barred from claiming relief under the rules of equity. The reason is that he has benefited from the alleged wrongdoing and he had also somehow acquiesced to the alleged wrongdoing by doing or saying nothing for a period of time.

[150] In this connection, we are compelled to observe that the principles in relation to "clean hands" or "proper person" or whether one should have control over the derivative proceedings is more associated with the common law derivative action with regard to the issue of *locus standi* to bring a derivative action. Looking at the present regime of the CA 2016, and as we have stated at the outset, the common law derivative action has been replaced with the statutory derivative action under ss. 347 and 348 of the CA 2016, where significantly, s. 347(3) of the CA 2016 has abrogated the right of a person to commence derivative action at common law. So, simply put, the principles under common law, namely, the well-entrenched exceptions to the rule in *Foss v. Harbottle* cease to apply for leave applications under s. 348 of the CA 2016.

[151] In the same context, since s. 345 of the CA 2016 has adequately provided the definition of complainant who may, with the leave of the court, initiate, intervene in or defend a proceeding on behalf of the company, it may be less appropriate to rely on the principles in relation to "clean hands" to determine whether an applicant is a proper plaintiff as the said principle is more consonant with the common law derivative action.

[152] Nevertheless, we do appreciate that notions of equity can be relevant when considering the element of "good faith" under the new CA 2016. We would therefore agree with the observations by the Supreme Court of New South Wales in the case of *Fiduciary Ltd v. Morningstar Research Pty Ltd* (2005) 53 ACSR 732, as follows:

> ... According to *Swansson* (at [43]), the court will also import notions of equity into the good faith requirement, so that if the applicant seeks to receive a benefit which, in good conscience, he or she should not receive, then the application will not have been made in good faith even though the company itself also stands to benefit, Such a benefit would include double recovery, in a case where the applicant has benefited from knowingly assisting the wrongdoer and now seeks to benefit indirectly from the company's success in the litigation.

[153] We only need to reiterate for clarity that an applicant will not be disqualified from commencing a derivative action for the benefit of the company if he will derive any other benefit from the claim. What is more important is that the applicant must not be pursuing an ulterior purpose unrelated to the subject matter of the claim and that, but for his ulterior purpose, he would not have commenced proceedings at all. If that is the case, then that is an abuse of process (see *Lesini* (*supra*)).

[154] Now, the High Court found that the plaintiff was a direct and knowing participant of the alleged wrong as he had sanctioned the payment of the shareholders' interest. The plaintiff is therefore not a proper party to initiate the proposed derivative action. By relying on the cases of *Nurcombe* and *Swansson*, the High Court noted as follows:

> [60] It is difficult for this Court to accept the argument that there was unjustified payment of Shareholders' Interest to AMMSB (*sic*) and NSSB. This is especially when NSSB was the beneficiary of the payments in 2013, 2014, 2015, 2016 and 2017. This therefore begs the question whether the Plaintiff has the right to initiate derivative action against the Defendant. For this reason, the following conduct of the Plaintiff and Dato' Wan must be considered. They are:
>
> (a) The Plaintiff and Dato' Wan, as nominee directors of NSSB, did not object to payment of Shareholders' Interest for the years 2013 and 2014 duly approved at the 7.3.2016 Board Meeting.
>
> (b) The Plaintiff also approved payments on Shareholders' Interest for the 2015 and 2016 based on the Shareholders' Advances reflected in audited accounts.
>
> (c) The Shareholders' Interests were all calculated on Shareholders' Advances based on the yearly audited accounts and financial statements.
>
> (d) NSSB received and collected interest payments for 2013, 2014, 2015 and 2016 without dispute, complaint or protest.
>
> (e) The Plaintiff, Dato' Wan and NSSB, approved the audited accounts for 2013 and 2014 and the 10-month management accounts up to 31.7.2015.

A (f) NSSB also accepted and cleared payment of shareholders' dividends based on the Defendant's audited accounts for year 2017. This was even after Crowe Horwath issued their first findings in the first report.

[155] With respect we disagree. Apart from the fact that the learned judge B had inappropriately referred to the common law principles laid down in *Nurcombe*, *Towers* and *Swansson* to disqualify the plaintiff from being the proper party to file and/or have control of the derivative action, the learned judge had also overlooked the plain facts and evidence which the Court of Appeal had correctly, in our view, assessed as follows:

C [121] The context and surrounding circumstances of the simmering suspicion must be appreciated as following the Crowe Horwath's Preliminary Report prepared as a result of the Inspection Order from another High Court, Timor's solicitors repeatedly wrote to the Company's solicitors to request supporting documents to evidence the Shareholders' Advances.

D [122] The parties were engaged in a protracted exchange of correspondence on this from February 2017 to November 2018. When no supporting documents were forthcoming from the Company's management, the plaintiff can hardly be faulted for having a legitimate concern as to the veracity of AMSB's purported payment to Shin Yang E and, in turn, the Shareholders' Advances.

[123] Timor and Wan, the Minority Directors, stopped approving, after July 2017, the payment of Shareholders' Interest on the Advances. By then they had a basis to take such a position that until all issues pertaining to payment of the Balance Purchase Price to Shin Yang and the F Shareholders' Advances have been properly verified and substantiated, they would not be approving such payments out.

[124] Consistent with the stand taken, Wan declined to sign cheques for payment of Shareholders' Interest forwarded to him by Captain Suresh on 6.3.2018, as Timor and he had not received the requested documentation to show AMSB's actual Shareholders' Advances to the Company.

G [125] At a Board Meeting on 10.4.2018, Timor took the position the Board should defer payment of Shareholders' Interest until all issues relating to the Company's accounts have been resolved. Timor also noted he had not been provided with supporting documents to evidence payments made by the Company to Shin Yang.

H [126] Therefore, rather than being said to be comfortable with and consenting to the payment of Shareholders' Interest, the Minority Shareholder, on becoming aware of the discrepancies and probably dubious Shareholders' Advances, unsupported as they are by relevant documents, had deferred and refused to approve the further repayment I out of the Shareholders' Interest until the issues are resolved.

[127] With respect, the High Court was plainly wrong in finding that Timor and NSSB had not raised the discrepancies in the Shareholders Advances with the Company or Minority Shareholder AMSB, The documentary evidence plainly shows when the Company received Shin Yang's Demand, Timor had made, from August 2015, repeated requests for supporting documents related to the accounts and copies of the relevant accounting records at Board meetings and by emails and letters. He also sought to inspect the books of the Company.

[128] The High Court, in agreeing with the defendant, also failed to appreciate that the issue of dividends is a completely separate matter from the Shareholders' Advances. As we are aware, under the Act, dividends are payable to all Shareholders if there are profits generated by the Company. Indeed, if there are less payment out of Shareholders' Interest, which is a costs to the Company for the internal financing from the Shareholders' Advances to help finance the Tug Boats, in the context of questionable payments, there would be more profits available for payment of dividends to Shareholders.

[129] In any event, Timor expressly stated in his email dated 25.5.2018 that NSSB's acceptance was conditional and without prejudice to its rights to question the irregularities in the Company's accounts and was not to be taken as acknowledgment and acceptance of the obvious discrepancies in them. That was a reasonable approach to take as one can appreciate that the Majority Shareholder in AMSB would be keen to recoup its returns from their investment as soon as possible judging from their cash flow projection.

[156] So, in our assessment, and with respect, the High Court was wrong in holding that the plaintiff was a direct and knowing participant of the alleged wrong as he had sanctioned the payment of the shareholders' interest. This was against the irrefutable evidence that the plaintiff and Dato' Mohamed Yaacob, the minority directors, stopped approving, after July 2017, the payment of shareholders' interest on the advances. On becoming aware of the discrepancies and probably dubious shareholders' advance, unsupported by relevant documents, they had deferred and refused to approve the further repayment out of the shareholders' interest until the issues were resolved.

[157] The plaintiff had also expressly stated in his email dated 25 May 2018 that NSSB's acceptance of the dividend payment was conditional and without prejudice to its rights to question the irregularities in the company's accounts and was not to be taken as acknowledgment and acceptance of the obvious discrepancies in them, it was also noteworthy that NSSB also undertook to refund any shareholders' interest it received upon the portion of the shareholders' advance that it did not pay to the defendant.

[158] For all the reasons stated above, it is our judgment that the Court of Appeal was right to grant leave to commence derivative proceedings. It was plain to us that the elements of "good faith" and "best interest of the company" as required under s. 348(4) of the CA 2016 were satisfied. Accordingly, this appeal could not succeed.

A

Overall Conclusion

[159] In the circumstances, and for the reasons mentioned, we found no merits in both the appeals. Accordingly, both appeals are dismissed with costs. We affirm the decisions of the Court of Appeal in each appeal. As indicated earlier, we would not specifically answer the questions of law for both appeals as most of the questions relevant to the appeals had been adverted to and answered in this judgment.

B

[160] As for costs, in Appeal 31, we had ordered the plaintiff/appellant to pay costs of RM100,000 to the defendant. As for costs in Appeal 32, we had ordered the defendant/appellant to pay costs of RM100,000 to the plaintiff. Costs are subject to allocator. Since the delivery of our decision, our learned brother Vernon Ong Lam Kiat FCJ has since retired. This judgment is therefore prepared in accordance with s. 78 of the Courts of Judicature Act 1964.

C

D

E

F

G

H

I